11-7-2013

Taylor v. Riley Respondent's Brief Dckt. 40595

IN THE IDAHO SUPREME COURT

Docket No. 40595-2012 and 40599-2012

REED TAYLOR,
Plaintiff-Respondent,

v.

RICHARD A. RILEY, an individual; HAWLEY TROXELL ENNIS & HAWLEY LLP, an Idaho limited liability partnership; SHARON CUMMINGS, Personal Representative of the Estate of Robert M. Turnbow; and EBERLE, BERLIN, KADING, TURNBOW & McKLVEEN, CHARTERED, an Idaho corporation,

Defendants-Appellants.

PERMISSIVE APPEAL FROM ADA COUNTY DISTRICT COURT
THE HON. RICHARD D. GREENWOOD, DISTRICT COURT JUDGE, PRESIDING

RESPONDENT'S BRIEF TO DOCKET NOS. 40595-2012 and 40599-2012

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

I. NATURE OF THE CASE

Idaho lawyers have been preparing and delivering third-party closing opinion letters for over 100 years. This case presents the important question of whether attorneys in Idaho, like attorneys in other jurisdictions, owe duties to third-party opinion letter recipients.

Appellants Richard A. Riley ("Riley"), Robert M. Turnbow/Sharon Cumming, P.R. of the Turnbow Estate ("Turnbow") and Eberle Berlin, Kading, Turnbow & McKlveen ("Eberle") prepared and delivered a third-party closing opinion letter to Reed Taylor ("Taylor") inviting him to rely upon it, at the direction of AIA Services Corp. ("AIA"). After Judge Brudie ruled on June 17, 2009 that the stock redemption agreement was illegal and unenforceable, Taylor filed this present case against Riley, Turnbow and Eberle. The district court ruled below that "Riley and Turnbow had a duty to Taylor, a non-client, to draft the opinion letter in a no[n]-negligent fashion." Riley agreed: "I think that in Judge Greenwood's opinion he stated very well what the duties of an opinion giver are." This Court should affirm in all material respects on the correct theories through which duties are owed and reserve an award of fees to Taylor for remand.

II. STATEMENT OF THE CASE

Pursuant to I.A.R. 35(b)(3), Taylor objects to Riley, Turnbow and Eberle's Statements of the Case and corrects many of the inaccuracies or omissions in the argument section below.[1]

Riley, Turnbow and Eberle provided Taylor a third-party opinion letter, which is attached as Appendix A. (R 824-28.) When Riley, Turnbow and Eberle renewed their motion for summary judgment, Taylor had Professor Richard T. McDermott, professor of corporate law at

[1] Taylor moved to augment the record contemporaneously with filing this brief. The augmented documents are numbered 2688 through 3436 and Taylor's citation of "R" includes the record and augmented record.

Fordham Law School, submit expert witness opinions. (R 3378-88.) His Affidavit is attached as Appendix B and it has been redacted to reflect those portions that Judge Greenwood ruled should be stricken at the hearing held for the motion to strike. (R 3394-3407; Tr. II, p. 13-17.)

III. ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Should this Court affirm Judge Greenwood on the correct legal theories or because his errors, if any, were harmless?

2. Should this Court decide issues which were never asserted below and/or that exceed the scope of the questions presented and answered by Judge Greenwood?

3. Have Riley, Turnbow and Eberle waived certain issues on appeal for failing to submit both argument and authority, and are they judicially estopped from asserting *res judicata*?

4. Should this Court award Taylor attorneys' fees and costs on appeal?

IV. ARGUMENT

On a permissive appeal, this Court is "constrained to rule narrowly and address only the precise question that was framed by the motion and answered by the trial court." *Rountree v. Boise Baseball, LLC*, 154 Idaho 167, __, 296 P.3d 373, 376 (2013) (citation omitted). The party asserting a defense bears "the burden of demonstrating the absence of a genuine issue of fact material to...[the] defense." *Mason v. Tucker and Assocs.*, 125 Idaho 429, 437, 871 P.2d 846 (Ct. App. 1994). The non-moving party receives all favorable evidentiary constructions and all reasonable inferences. *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 980 P.2d 566 (1999); *Rawson v. United Steelworkers of Am.*, 111 Idaho 630, 726 P.2d 742 (1986). "Findings of fact and conclusions of law are unnecessary...[for] decisions on motions under Rules 12 or 56." I.R.C.P. 52. "Where the lower court reaches the correct result by an erroneous theory, this Court will affirm the order on the correct theory." *Nampa & Meridian Irr. Dist. v. Mussell*, 139 Idaho

28, 33, 72 P.3d 868 (2003); *Mickelsen v. Broadway Ford, Inc.*, 153 Idaho 149, 154, 280 P.3d 176 (2012). A party is "not required to file a cross-appeal" in order to "affirm the district court's decision...on an alternative basis." *Idaho Dev., LLC v. Teton View Golf Estates, LLC*, 152 Idaho 401, 409, 272 P.3d 373 (2011). "A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." *Bolognese v. Forte*, 153 Idaho 857, 866, 292 P.3d 248 (2012) (citation omitted). "[A]n appellant can only appeal if the claimed error affected a substantial right" and issues raised for the first time on appeal will not be considered. *Id.*

A. This Court Should Affirm that the Appellants Owed Duties to Taylor.

"Whether a duty exists is a question of law, 'over which this Court exercises free review.'" *Rountree*, 296 P.3d at 377 (citation omitted). "[A]n assumed duty...results from a voluntary undertaking" and the determination of such a duty is a question of fact. *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*, 125 Idaho 607, 611-12, 873 P.2d 861 (1994).

1. Judge Greenwood Correctly Ruled that the Appellants Owe Duties to Taylor.

Judge Greenwood correctly ruled that "Riley and Turnbow had a duty to Taylor, a non-client,[2] to draft the opinion letter in a no[n]-negligent fashion" and that "[t]he lawyer issuing the letter is specifically aware of the reliance by the non-client." (R 1684, 2569; App. A.) Riley, Turnbow and Eberle assert, without citing any authority to support their positions, that no duties were owed to Taylor. (Riley Br. at 38-40; Eberle Br. at 13-18.)

Judge Greenwood has ruled twice that the duties owed to Taylor are consistent with *Harrigfeld v. J.D. Hancock*, 140 Idaho 134, 90 P.3d 884 (2004). (R 1684, 2567-69.) Riley,

[2] Riley, Turnbow and Eberle are estopped from asserting lack of privity with Taylor. *Crossland Savings Bank FSB v. Rockwood Insurance Company*, 700 F. Supp. 1274, 1281 (S.D. N.Y. 1988).

Turnbow and Eberle failed to (1) identify any substantial right that they are being deprived of by owing duties to Taylor; (2) address any of the elements of the balance-of-the-harms test; (3) provide any authority or argument why that test does not apply; and, (4) deny that they voluntarily assumed a duties to Taylor. They also fail to address any of elements of the *Harrigfeld* balance-of-the-harms test or deny that they assumed duties to Taylor. (R 1814-18, 1888-89, 2446-50, 2528, 3409-13.) Their arguments fail and they have waived duty issue.

It is well-settled that "[g]enerally speaking, '[e]very person, in the conduct of his business, has a duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others.'" *Rountree*, 296 P.3d at 377 (citation omitted). "A voluntary duty is distinct from any other duty a party may have as a result of an undertaking or relationship." *Jones*, 125 Idaho at 611-12. In addition, "[a]n attorney's duty arises out of the contract between the attorney and his or her client." *Harrigfeld*, 140 Idaho at 137.

Here, Turnbow and Eberle admit "through [their] then affiliation with Riley, [were] involved in the drafting and delivery of an Opinion letter addressed to [Taylor] which was delivered at closing of the redemption transaction at the direction of AIA." (R 72 ¶10, 96-97 ¶10, 824-28, 1784-85 ¶10, 2960, 3017, p. 5; App. A.) Riley admitted that he "participated in the drafting and delivery of an opinion letter addressed to [Taylor] which was delivered at closing of the redemption transaction…in satisfaction of a condition precedent to [Taylor's] obligation to close the transaction." (R 54 ¶¶10-11, 824-28; App. A.) Riley also admitted that Eberle Berlin was engaged…at the request of AIA, to render certain opinions concerning the transaction." (R 2960.) Thus, Riley, Turnbow and Eberle either owed duties to Taylor under *Harrigfeld* or

assumed them under *Jones*—or both. Taylor asserted Riley, Turnbow and Eberle could owe duties under the balance-of-the-harms test or the assumed duty doctrine. Judge Greenwood only needed to deny the motion. I.R.C.P. 52. (R. 898-99, 1532-34, 1543, 1694, 2446-50, 2570.) The issue of the correct legal theory(ies) through which duties are owed is properly before this Court.

Judge Greenwood correctly ruled that Riley, Turnbow and Eberle owed duties to Taylor based on *Harrigfeld*. (R 1685, 2567-70.) In extending a duty beyond the scope previously imposed, this Court engages in a balance-of-the-harms test. *Harrigfeld*, 140 Idaho at 138. Even after Judge Greenwood relied on *Harrigfeld* in his decisions, Riley, Turnbow and Eberle do not address any of the elements of the balance-of-the-harms test on appeal. (R 1685, 2567-70.)

In *Harrigfeld*, this Court held that attorneys preparing testamentary instruments owe duties to the named beneficiaries and if that testator's intent, as expressed in the instruments, is frustrated and the beneficiary's interest in the estate "is either lost, diminished, or unrealized, the attorney would be liable to the non-client beneficiary." *Harrigfeld*, 140 Idaho at 138. This Court explained that one of the main purposes of testamentary instruments is to transfer property to the persons named in the instruments, so harm to those persons is "clearly foreseeable." *Id.* This Court found that there is sufficient moral blame when an attorney negligently prepares the instruments and imposing a duty creates an incentive for attorneys to "prepare such instruments carefully because otherwise there would be no liability for the negligent drafting of such instruments." *Id.* Finally, this Court found that extending a duty would "not unduly increase the burden upon attorneys" because "insurance is readily available to cover such risk." *Id.*

Here, Riley and Turnbow drafted the instruments intended to transfer property to Taylor

(i.e., approved the stock redemption agreement and related instruments). But they went a step further by providing an opinion letter stating that Taylor would receive the property promised to him in the instruments. (R 824-28; App. A.). Thus, Taylor does not necessarily seek to extend *Harrigfeld*, but rather to simply apply it to circumstances in this case, which is precisely what Judge Greenwood did. In both of his decisions, Judge Greenwood broadly denied the motions for summary judgment as to Taylor's malpractice claim.[3] (R 1694, 2570.) When Judge Greenwood denied the renewed summary judgment motions, he ruled that he adhered to his prior decision. (R 2569.) In his earlier decision, Judge Greenwood explicitly relied on *Harrigfeld*:

> The opinion letter authored by Riley and Turnbow as part of that work was addressed to Taylor, specifically provided that it was for Taylor's benefit, and acknowledged that he would rely on it...Riley and Turnbow argue strenuously that there was no attorney client relationship and therefore no duty was owed to Taylor. Defendants are partly right. There is no attorney client relationship. That does not necessarily mean there was no duty.
>
> ...Although this precise issue has not been addressed by Idaho courts, the holding of cases such as *Prudential, supra*, are consistent with the reasoning of our Supreme Court in *Harrigfeld*...Riley and Turnbow had a duty to Taylor, a non-client, to draft the opinion letter in a no[n]-negligent fashion. That is, to exercise the ordinary care, skill and prudence of a lawyer under the circumstances.

(R 1684.) When Riley, Turnbow and Eberle renewed their motion for summary judgment after the stay was lifted, Judge Greenwood again relied upon *Harrigfeld* to support his decision:

> The general rule of no liability to a non-client as announced in *Herrigfeld* is based in a large part on the notion that the scope of duty owed by the attorney is defined by the contract between the attorney and client as to what is being undertaken. This is bolstered by the strong policy that the attorney should be free to give

[3] Turnbow and Eberle's argument that Judge Greenwood "failed to engage in a balancing-of-the-harms test" is misplaced, as he was only required to deny the motion for summary judgment. I.R.C.P. 52; Eberle's Br. at 18. Even if the argument was well taken, it would only be harmless error since that test was satisfied here. I.R.C.P. 61. Taylor submitted argument that all of the elements were present, which was not disputed below. (R 2449-50.)

> advice and perform work, including the drafting of documents, to the client without fear of liability to a third party. This, in turn, is grounded in the strong policy in Idaho that the attorney's loyalty should be to the client and no one else. Another underlying principle limiting third party liability is a concern that there could be a large, unpredictable class of persons purporting to rely on advice rendered by the lawyer. This could lead to virtually unlimited liability.
>
> In the case of an opinion letter, such as we have here, *those concerns do not prevail*. The lawyer issuing the letter is specifically aware of the reliance by the non-client. The universe of potential injured parties is limited to those to whom the letter is addressed. The rule proposed by the defendants is tantamount to a grant of immunity to the attorney.

(R 2568-69 (emphasis added).[4]

As to the first element of the balance-of-the-harms test, Riley, Turnbow and Eberle prepared and delivered the opinion letter to Taylor for him to rely upon. (R 824-28; App. A.) The opinion letter's purpose was to benefit and influence Taylor. *Id.* No one forced Riley and Turnbow to prepare and deliver the opinion letter. (R 72 ¶10, 96-97 ¶10, 824-28, 1784-85 ¶10, 2155 ¶10.) The opinion letter made significant representations to Taylor, including the following:

> **[1]** We have relied upon…the corporate records provided to us by the Company…**[2]** The Company and its Subsidiaries have full corporate power and authority to enter into, execute and deliver the Transaction Documents and to perform their respective obligations thereunder; **[3]** all corporate action on the part of Company and its Subsidiaries, and their respective directors and shareholders, necessary for the authorization, execution, delivery and performance by Company and its Subsidiaries of the Transaction Documents and the consummation of the transactions contemplated thereby has been taken; and **[4]** the Transaction Documents have been duly executed and delivered by Company and its Subsidiaries…**[5]** The Transaction Documents constitute the valid and binding obligation of Company and its Subsidiaries enforceable against

[4] In fact, Riley agreed with Judge Greenwood's reasoning when he was deposed in 2012. (R 2855, p. 68.)

> them in accordance with their respective terms...Neither the execution and delivery of the Transaction Documents by Company and its Subsidiaries, nor the consummation of the transactions contemplated thereby, will...**[6]** conflict with or violate any provision of their respective Articles of Incorporation or Bylaws, as amended...**[7]** to the best of our knowledge, violate any law, rule, license, regulation, judgment, order, ruling, or decree...**[8]** No consent, authorization, approval or exemption by, or filing with, any Person or any Governmental Authority is required in connection with the execution, delivery and performance by Company and its Subsidiaries of the Transaction Documents, or the taking of any action contemplated thereby, except such as have been obtained prior to Closing...**[9]** Upon delivery of certificates representing the Pledged Shares of AIAI and Farmers to Shareholder at Closing, Shareholder shall have at Closing a perfected first priority security interest in such Pledged Shares...**[10]** but the inclusion of such rights, remedies and waivers does not affect the validity or enforceability of other provisions of the Transaction Documents and, **[11]** in the event Company or any of its Subsidiaries does not comply with the material terms of the Transaction Documents, Mr. Taylor may exercise remedies that would normally be available under Idaho law to a secured party provided Idaho law applies and Mr. Taylor proceeds in accordance with such law...

(R 824-27; App. A, p. 1-4 (emphasis added).) The Eberle law firm recognized potential liability and formed a committee to approve opinion letters prior to delivery. (R 2862, p. 96-97.) Judge Greenwood correctly ruled that "[t]he universe of potential injured parties is limited to those to whom the letter is addressed." (R. 2569.) In fact, if the opinion letter had been correct or disclosed the reasoning for the opinions, it would have allowed Taylor to ensure that AIA complied with I.C. § 30-1-6. (R 3385-86 ¶f; App. B, p. 8-9.) Appellants were aware that if the transaction was illegal and the opinion letter was incorrect, Taylor would be damaged. (R 351-76, 820.) *Taylor v. AIA Services Corp.*, 151 Idaho 552, 261 P.3d 829 (2011).

As to the second element, if opinion letters are incorrect, there is a high likelihood of harm. As Judge Greenwood noted, "[t]he lawyers issuing the opinion letter is [sic] specifically aware of the reliance by the non-client." (R 2569.) When Judge Brudie ruled the stock

redemption agreement was illegal and unenforceable, he also expressly ruled that Taylor relied heavily on the opinion letter and that the letter was incorrect. (R 351-64, 362 n.15.) In *Taylor*, this Court affirmed Judge Brudie's rulings in all material respects. *Taylor*, 151 Idaho 552. Taylor was left with an unenforceable $6M Note and no retirement funds. (R 820-22 ¶¶13, 16.) There was a high degree of certainty of foreseeable harm to Taylor, particularly when Riley, Turnbow and Eberle were general counsel for AIA. (R 824, 3384 ¶¶c-d; App. A, p. 1; App. B, p. 7 ¶¶c-d.)

As to the third element, Riley, Turnbow and Eberle's conduct could not be closer to Taylor's injury. The opinion letter was vital to Taylor as a condition for closing the redemption transaction. (R 838, 72 ¶10, 96-97 ¶10, 824-28, 1784-85 ¶10.) Taylor would not have closed the redemption transaction absent the opinion letter. (R 815-16 ¶¶5-6, 1398-1400.) As Professor McDermott opined, had the opinion letter revealed Riley's convoluted "fair value" analysis, which he claims to have performed at the time the letter was prepared, it would have raised red flags, and any reasonable opinion recipient would have taken action to ensure compliance with I.C. § 30-1-6. (R 2936-44, 3386 ¶f; App. B, p. 9 ¶f.)

As to the fourth element of the balance-of-the-harms test, there is no question of the moral blame attributable to Appellants. They were general counsel for AIA and prepared the opinion letter. (R 824; App. A, p. 1.) They controlled the accuracy of their opinions. *Id.* Unlike *Harrigfeld* where the beneficiary might not even know about the will or its effect, Appellants addressed the opinion letter to Taylor and invited him to rely on it. (R 824, 828; App. A, p. 1, 5.)

As to the fifth element, there is great need for a policy preventing future harm by imposing a duty on those issuing opinion letters to accurately prepare such letters. By imposing

duties and liability under these circumstances, this Court would create incentives for opinion givers to accurately prepare and deliver opinion letters, and to provide reasoned opinions when necessary to prevent opinion letters from being misleading. (R 3386, ¶f; App. B, p. 9 ¶f.)

As to the sixth element, no heavy burden is being imposed on opinion givers. Opinion givers determine the transactions that they prepare and deliver opinion letters for. Opinion givers decide whether they are willing to risk their reputation and potential liability by providing an opinion letter addressed to a non-client. As Judge Greenwood found, "[t]he universe of potential injured parties is limited to those to whom the letter is addressed." (R 2569.)

As to the seventh element of the test, Riley, Turnbow and Eberle collectively have $20,000,000 in coverage to pay for defense costs and any damages. (R 2854, p. 64, 3011, p. 12, 3024-66.) The policies evidence the availability of insurance for opinion givers and Judge Greenwood recognized that such insurance was available. (*Id.*; Tr. I, p. 44, L. 16-25, 46, L. 3-7.)

Judge Greenwood's two decisions imposing duties upon Riley, Turnbow and Eberle to prepare and deliver the opinion letter to Taylor in a non-negligent fashion are consistent with all of the elements of the balance-of-the-harms test. (R 1684, 2567-69.) If this Court rules that Judge Greenwood should have analyzed all seven elements of that test, his failure to do so is harmless error because all of the elements of the test were satisfied. I.R.C.P. 52; I.R.C.P. 61.

Although this precise issue is one of first impression in Idaho, Judge Greenwood's decisions are consistent with the long history of cases in other jurisdictions holding that non-clients are owed duties through opinion letters. *Bradford Secs. Processing Servs., Inc. v. Plaza Bank and Trust*, 653 P.2d 188, 189-91 (Okl. 1982); *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1563

(7th Cir. 1987); *Crossland Savings Bank*, 700 F. Supp. at 1281-84; *Vanguard Prod., Inc. v. Martin*, 894 F.2d 375, 376 (10th Cir. 1990); *Stock W. Corp. v. Taylor*, 942 F.2d 655, 666 (9th Cir. 1991); *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 605 N.E. 2d 318, 320 (N.Y. 1992); *Montgomery Cnty. v. Jaffe, Raitt, Heuer & Weiss, P.C.*, 897 F.Supp. 233, 237 (D.C. Md. 1995); *Dean Foods Co. v. Pappathanasi*, 2004 WL 3019442 *11 (Mass. Super. Ct. 2004); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51(2) (2000); Glazer and Fitzgibbon on Legal Opinions, §2.3.2 at 67 (3d ed.) ("Glazer") ("The general rule on liability is that a lawyer owes a duty of care to a non-client addressee of a closing opinion"); Legal Opinion Letters: A Comprehensive Guide to Opinion Practice, §3.3 at 3-9 (3d ed.) ("the giver of an erroneous legal opinion who fails to exercise reasonable care in connection therewith can be held liable for negligence").[5]

Finally, Taylor's expert, Professor Richard T. McDermott, has been a member of the preeminent TriBar Opinion Committee for over 20 years—the Committee that publishes the reports that Riley relies upon for his opinion practice. (R 2844, p. 24, 3380 ¶8.) McDermott opined as to breach of duty and proximate cause; and Riley, Turnbow and Eberle never rebutted those opinions.[6] (R 3382-86; App. B, p. 5-9.) Riley, Turnbow and Eberle have failed to provide any compelling reasons why the Court should not find that opinion givers owe duties to the addressees of opinion letters. Accordingly, this Court should affirm Judge Greenwood's decision

[5] Taylor's expert witness in this case is the author of this Chapter. (R 3380 ¶7; App. B, p. 3 ¶7.)

[6] McDermott also opined that the alleged negligent acts of Taylor's independent counsel Cairncross are separate and distinct from Riley, Turnbow and Eberle's duties owed to him through the opinion letter. (R 3386 n. 2; App. B, p. 9 n. 2.) Glazer, §§1.1, 1.3.1 and 2.3.2 at 1, 10-12 & 67; Legal Opinion Letters, §3.2 at 3-4. As noted by Riley, Turnbow and Eberle, Taylor has also pursued claims against his independent counsel. (R 1895-1911.)

that Riley, Turnbow and Eberle Berlin owed duties to Taylor, as a non-client. (R 2567-70.)

The cases cited by Riley, Turnbow and Eberle are either inapplicable or distinguishable. Riley, Turnbow and Eberle *cite no authority* for the proposition that opinion givers should not owe such duties; they merely nakedly assert that this Court should not recognize duties being owed to the non-client recipients of opinion letters. (*See* Riley Br. at 38-40; Eberle Br. at 13-19.)

2. The Court Should Affirm on All Correct or Alternate Theories.

Judge Greenwood's decision should be affirmed on *all* the correct alternative theories through which duties are owed to Taylor, which were by him on summary judgment and reconsideration.[7] (R 40-48, 1674-75, 1677-95, 2446-49, 2452-58, 2796-98, 2823-27.) Taylor is not seeking to reverse a final judgment, so a cross appeal is not required.[8] *Mussell*, 139 Idaho at 33; *Mickelsen*, 153 Idaho at 154; *Idaho Dev., LLC*, 152 Idaho at 409. In order for this Court to answer the question presented to Judge Greenwood, it should determine the causes of action through which duties are owed—there cannot be one without the other. (R 1814-18, 1888-89.)

This Court should hold that duties are owed to Taylor not to make negligent misrepresentations. Judge Greenwood dismissed that claim because this Court limited the claim to accountants. *Id.* (R 40-41, 824-28, 1674-75, 2446-47; Tr. I, p. 118-20, 130; App. A.) Judge Greenwood explained, "Well, I have to take [the Idaho Supreme Court] at their word. And they didn't say: We've limited it to professionals or we're limiting it to CPAs and similar people with

[7] Judge Greenwood denied Taylor's motion for reconsideration because the "motion was withdrawn at the hearing." (R. 2570.) There was some confusion as to the portion of the motion that was withdrawn: (The Court): You withdraw the motion as to Hawley Troxell? (Mr. Gaffney): Yes. (Tr. II, p. 79, L. 13-15.) Taylor's motion for reconsideration was withdrawn only as to Hawley Troxell.

[8] And, in fact, was dismissed by the Court. (R 2674-75.)

a professional relationship. They flat said: We're limiting it to accountants." (Tr. I, p. 119, L. 12-16.) When this Court first adopted negligent misrepresentations as a claim against accountants, it relied heavily upon *Ultrameres Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931) and *Credit Alliance v. Arthur Anderson & Co.*, 483 N.E.2d 110 (N.Y. 1985). *Idaho Bank & Trust Co. v. First Bancorp of Idaho*, 115 Idaho 1082, 1083-84, 772 P.2d 720 (1989). In the well-known *Prudential* case, the New York Court of Appeals "stressed that attorneys, like other professionals, may be held liable for economic injury arising from negligent misrepresentation" and "there is no reason to arbitrarily limit the potential liability to" accountants. *Prudential*, 605 N.E.2d at 320. The New York Court went on to rely on the *Credit Alliance* case relied upon by this Court in *Idaho Bank & Trust Co.*, when it held that an attorney may be liable for negligent misrepresentation in an opinion letter to a non-client. *Id.* at 322; *Idaho Bank & Trust Co.*, 115 Idaho at 1083-84. Riley, Turnbow and Eberle voluntarily provided the opinion letter to Taylor for him to rely upon for the redemption of his shares. (R 96 ¶8, 72 ¶10, 54 ¶¶10-11, 824-28, 2960; App. A.) The opinion letter made numerous misrepresentations of fact and opinion. (R 824-28; App. A.) Like *Prudential*, Riley, Turnbow and Eberle were well aware that their opinion letter would be relied upon by Taylor for the stock redemption transaction and "the end and aim of the opinion letter was to provide [Taylor] with the...information [he] required." *Prudential*, 605 N.E.2d at 322. (R 824-28; App. A.) "[A]s fully expected by [Riley, Turnbow and Eberle, Taylor] unquestionably relied on the opinion letter in agreeing" to sell his shares and Judge Brudie has made that determination as matter of law. *Id.* (R. 362 n. 15, 813-20.) "Finally, by addressing and sending the opinion letter directly to [Taylor, Riley, Turnbow and Eberle] clearly engaged in conduct

which evinced [their] awareness and understanding that [Taylor] would rely on that letter, and provided the requisite link between the parties." *Prudential*, 605 N.E.2d at 322. (R. 824-28; App. A.) Thus, the "bond between [Riley, Turnbow and Eberle] and [Taylor] was sufficiently close to establish a duty of care running from the former to the latter." *Id.*; *see also Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 128 Cal.Rptr. 901, 906 (Cal. Ct. App. 1976); *Greycas*, 826 F.2d 1560; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §§ 95(1) and (3). There is no reason for limiting negligent misrepresentation claims to accountants. This Court should hold that a duties are also owed through an opinion letter based on the theory of negligent misrepresentations and expand *Duffin v. Idaho Crop Improvement Association*, 126 Idaho 1002, 895 P.2d 1195 (1995).

This Court should also affirm Judge Greenwood including the correct theory(ies) of a duty being owed to Taylor through an assumed duty negligence/malpractice claim. Taylor argued an assumed duty claim below and Judge Greenwood either implicitly accepted that argument in his decisions or it should be formally adopted now. I.R.C.P. 52. (R 41-43, 1532-33, 1685, 2447, 2567-70; Tr. I, p. 111-12.) This Court has already ruled that an attorney may assume "a voluntary duty to act in [non-client's] best interests." *Jones*, 125 Idaho at 612-13. Riley, Turnbow and Eberle voluntarily prepared and delivered the opinion letter to Taylor and he relied upon it. (R 96 ¶8, 72 ¶10, 54 ¶¶10-11, 813-20, 824-28, 2960; App. A.) McDermott opined that Riley, Turnbow and Eberle had assumed and breached duties of care. (R 3385-86 ¶f; App. B, p. 8-9 ¶f.) This Court should hold that Riley, Turnbow and Eberle assumed duties to Taylor.

B. <u>The Duties Owed to Taylor Should Not Be Limited.</u>

Riley asserts for the first time on appeal that the duties owed to Taylor should be limited

to drafting the opinion letter and that he must prove more than ordinary negligence. (Riley Br. at 42-43.) Riley never asserted those issues below, they may not be raised for the first time on appeal, and they exceed the scope of this permissive appeal. (R. 1866-90, 2516-29, 2556-71, 2674-75.) *Forte*, 153 Idaho at 866; *Rountree*, 296 P.3d at 376. Riley's arguments also lack merit.

1. The Opinion Letter Has No Terms Limiting the Duties Owed to Taylor.

Riley argues that the duties owed to Taylor should be limited to "draft[ing] and issu[ing] a non-negligent opinion letter." Riley submits no authority for this argument, thereby waiving the issue on appeal. *Forte*, 153 Idaho at 866. Judge Greenwood ruled that "Riley and Turnbow had a duty to Taylor, a no[n]-client, to draft the opinion letter in a no[n]-negligent fashion" and "[t]he lawyer issuing the letter is specifically aware of the reliance by the non-client." (R 1684, 2569; App. A.) The opinion letter contains no limitations on the duties owed to Taylor and states that he may rely upon it for the "Transaction Documents and transactions contemplated thereby." (R 828, 824-28; App. A.) Because Riley, Turnbow and Eberle acted as general counsel for AIA,[9] drafted and approved the stock redemption agreement and related instruments, and provided Taylor with the opinion letter, then under the balance-of-the-harms test they assumed and/or owed duties to Taylor to ensure that he would get what was promised to him in the Transaction Documents, as further warranted by the opinion letter. (R 53-54 ¶¶8 & 10, 72 ¶10, 96-97 ¶10, 824-28, 1784-85 ¶10, 2153 ¶3, 2172-2223, 2960.) *Harrigfeld*, 140 Idaho 134. Under this Court's reasoning in *Harrigfeld*, the attorneys (Riley, Turnbow and Eberle) for the testator (AIA)

[9] "It is an ancient maxim that general counsel cannot thus delegate his duties of skill and discretion by the corporation delegated to him." *Central Hanover Bank & Trust Co. v. North Butte Min. Co.*, 4 F.Supp. 711, 713 (D. Montana 1933). The opinion letter states: "[w]e have acted as general counsel for [AIA] in connection with the transactions contemplated by the [Stock Redemption] Agreement." (R 824; App. A, p. 1.)

drafted/approved the "testamentary instruments" (the stock redemption agreement and related instruments) and also provided the "beneficiary" (Taylor) with an opinion letter stating that he would entitled to receive the assets in the "testamentary instrument" (the benefit of money and security interests in the stock redemption agreement and related instruments). *Id.* (R 824-28, 2172-2223; App. A.) The intent expressed in the stock redemption agreement and related instruments (including the $6M Note) were "frustrated in whole" by Judge Brudie's rulings. *Harrigfeld*, 140 Idaho at 139. (R 351-76.) The bottom line is that they communicated legal advice to Taylor and promised that he would receive the benefit of the bargain. (R. 824-28; App. A.) Taylor did not receive what was promised. *Id.* If the *Harrigfeld* beneficiary had malpractice claims without an opinion letter, there is even more reason for Taylor to have those claims.[10]

2. There Is No Basis to Require Taylor to Prove More than Ordinary Negligence.

Riley argues that this Court should adopt "justifiable or reasonable reliance" as an expansion to the existing elements of a malpractice claim. As this Court held in *Harrigfeld*, the non-client's claim is based on "the attorney's professional negligence." *Harrigfeld*, 140 Idaho at 139. This Court did not create a special "justifiable reliance" element for that claim. *Id.* at 138-39. Contrary to Riley's assertion, Judge Greenwood "refer[ed], somewhat loosely, to the negligence claim that survives as the 'malpractice claim.'" (R 2560 n. 3.) This Court's decision in *Bishop v. Owens*, 152 Idaho 616, 620, 272 P.3d 1247 (2012) does not stand for the proposition that "reliance" should be a new element for a malpractice claim. Riley cites no authority for "reliance" to be an element and his argument fails. *Forte*, 153 Idaho at 866.

[10] If Riley, Turnbow and Eberle had only provided the opinion letter and not represented AIA in drafting the agreements, then their duties to Taylor would arguably have been limited only to the accuracy of their opinions.

Riley's citations to the ABA Legal Opinion Accord are misplaced. (Riley Br. at 43.) The Accord only applies to opinion letters that state they formally adopt the Accord. ABA Third-Party Legal Opinion Report, 47 Bus. Law. 167, 179-80, 219 (1991). The opinion letter did not adopt it. (R 824-28; App. A, p. 1-5.) Indeed, "[i]n accepting an opinion letter, an opinion recipient ordinarily need not take any action to verify the opinions it contains." ABA Legal Opinion Principals §I(E), 53 Bus. Law 831, 832 (1998).[11] Taylor testified that he relied on the opinion letter and the opinions contained therein. (R 813-17.) In his brief, Riley omits a material portion of TriBar II: "The recipient of a third-party opinion letter is entitled (except in a few jurisdictions)[12] to rely on the opinions expressed without taking any action to verify those opinions." TriBar Opinion Committee, Third-Party "Closing" Opinions §1.6, 56 Bus. Law. 591, 604 (1998) ("TriBar II"). Riley admitted that he relied upon the TriBar Reports for his opinion practice and McDermott, Taylor's expert witness, is a long-time member of the Committee that drafted TriBar II. (R 2844, p 24, L. 8-11, 3380, ¶8; App. B, p. 3, ¶8.) The opinion letter was a "clean opinion." (R. 824-28, 3385 ¶f; App. A-B, p. 3 ¶f.) TriBar II §1.2, 53 Bus. Law. at 597 n. 15. McDermott testified the opinion letter did not provide the required disclosures or "reasoned opinions" for Riley's so-called "fair value" or other analysis and, thus, was misleading. (R. 2935-44, 2984-85, 3386 ¶f; App. B, p. 9 ¶f.) TriBar II §§1.2, 1.9(h)-(m), 53 Bus. Law. at 597, 606-07.

Taylor's reliance was adjudicated when Judge Brudie ruled that he "relie[d] heavily on an August 15, 1995 opinion letter." (R 362 n. 15, 1391 ¶4.) Moreover, Riley, Turnbow and Eberle

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[11] This report acknowledged "the Accord has not gained the national acceptance the Committee had hoped." *Id* at 831. *See* ABA Third-Party Legal Opinion Report, 47 Bus. Law. 167 (1991).

[12] Until now, Idaho is one of the "few jurisdictions" that has not addressed the issue.

maintain that "the Opinion Letter was and is believed...to be correct," so they can hardly assert that Taylor could not justifiably rely on it. (R 2936, 2984.) In fact, the opinion letter states: "[t]his opinion is furnished by use solely for your benefit for use in connection with the Transaction Documents and the transactions contemplated thereby; and it may not be...relied upon, by any other person." (R 828; App. A, p. 5.) The Court should decline making "justifiable or reasonable reliance" a new element of a legal opinion malpractice claim.

C. Taylor's Claims Are Not Barred By *Res Judicata.*

Judge Greenwood ruled that Taylor's claims are not barred by *res judicata*. (R. 2559-63.) This Court may also affirm his refusal to apply *res judicata* based on any one or more of the other reasons asserted by Taylor below. *Mussell*, 139 Idaho at 33; *Mickelsen*, 153 Idaho at 15; *Idaho Dev.*, 152 Idaho at 409; I.R.C.P. 61. (R 2470 n. 1, 2471, 2472-86, 2451, 2467-68, 1463-1508, 1650-52.) "*Res judicata* is an affirmative defense and the party asserting it must prove all of the essential elements:" (1) the same claims; (2) a final judgment; and (3) the same parties. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 122-24, 157 P.3d 613 (2007).

1. Judge Greenwood Correctly Ruled that Taylor's Claims Here Is a Different Transaction.

The thrust of Riley, Turnbow and Eberle's arguments to apply *res judicata* is that the transaction in this case was the same as the one in *Taylor v. McNichols*, 149 Idaho 826, 243 P.3d 642 (2010).[13] Judge Greenwood ruled "the [*McNichols*][14] case and current case are not sufficiently related in time, space, origin, motivation or trial evidence to arise from the same

[13] Riley and Eberle and Turnbow refer to *Taylor v. McNichols* as "Riley Lawsuit #1" and "Hawley Troxell No. 1," respectively. (Riley Br. at 12-29; Eberle Br. at 19-22.)

[14] Judge Greenwood refers to the *McNichols* case as "*Babbitt*" in his decision. (R 2561.)

transaction." (R 2562.) Idaho has adopted the transactional approach to determine whether claims are the same for purposes of *res judicata*:

> Whether a factual grouping constitutes a transaction "is to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."

Stanion, 144 Idaho at 126 (citation omitted). "The 'sameness' of a cause of action for purposes of application of the doctrine of res judicata is determined by examining the operative facts underlying the two lawsuits." *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 149, 804 P.2d 319 (1990). Judge Greenwood correctly stated the factual grouping constituting the transaction for Taylor's claims here and the factual grouping for the transaction in his claims in *McNichols*:

> The factual grouping that constitutes a transaction in [*McNichols*], is the thwarted efforts of Reed Taylor to gain control of AIA and collect the money due on the note. *Reed Taylor was suing Riley and the other attorneys for their behavior in representing John Taylor and AIA in that action.* His references to the opinion letter were in the context of his unsuccessful effort to convince Judge Brudie that he had a tort cause of action for the lawyer conduct in [*McNichols*]. He was claiming that Riley's new firm, Hawley Troxell, and its lawyers owed a duty to not represent AIA or John Taylor because Riley earlier represented Reed Taylor in authoring the opinion letter. While the opinion letter played a role in the AIA suit and in Babbitt, the *issuance of the opinion letter arose from an entirely separate set of facts and circumstances.*
>
> In this case, the factual grouping that constitutes the transaction is the issuance of the opinion letter and events surrounding its issuance. This is 10 years remote in time from the events that led to the [*McNichols*] case. The claim originates in Turnbow's and Riley's alleged malpractice in drafting the 1995 opinion letter. *This is wholly unrelated to the alleged conduct in [McNichols]...*The opinion letter was not central, or even important in the outcome in [*McNichols*]. What Mr. Riley did, or did not do, while drafting the 1995 opinion letter has nothing to do with him helping John Taylor and AIA commit torts in 2007. Although, this current case and [*McNichols*] have a common tie in the 1995 stock redemption

agreements, the two cases deal with wholly separate transactions.

> In summary, the [*McNichols*] case and current case are not sufficiently related in time, space, origin, motivations or trial evidence to arise from the same transaction. Because the two cases do not arise out of the same transaction or related transactions, Taylor's claim against Riley is not barred by *res judicata*...[15]

(R 2561-63.) Riley, Turnbow and Eberle focus on trying to convince this Court that Taylor could have asserted his claims here in *McNichols*, instead of proving the operative facts were the same and that the factual grouping, evidence, trial evidence and motivations were the same.

An examination of the facts asserted in Taylor's complaints against HTEH (and Riley) and Clements Brown is dispositive. Both complaints assert claims for conversion, tortious interference, conspiracy, aiding and abetting, fraud and malpractice representing the AIA corporations. (R 620-668.) The two cases were virtually identical, which is why this Court consolidated them on appeal. *McNichols*, 149 Idaho at 830. A review of the complaints, pleadings, memoranda, transcripts and decisions in both cases show they were based on the same transaction, which is an entirely different one than in this case. (R 383-553, 753-773, 972-75, 1284-1388.) At the hearing held to dismiss both cases in *McNichols*, Riley's attorney argued "[t]his case presents the question of whether a plaintiff may sue his adversary's attorneys for decisions made by those attorneys *in the course of defending their clients*." (R 1364, p. 8, ll. 16-20 (emphasis added).) Riley asserted: "Taylor's arguments...depend upon the assumption, although the complaint does not so allege, that he has already prevailed in the lawsuit against AIA Services...[and] anyone who opposes his litigation position in the Underlying Litigation is

[15] In his first decision, Judge Greenwood dismissed Taylor's malpractice claims against Hawley Troxell based on res judicata, "[t]o the extent [he] seeks to make [such] a claim." (R 1682-83.) But Taylor never asserted any malpractice claim against Hawley Troxell. (R 41-43.)

acting improperly." (R 1324.) "His attempt to place himself in the shoes of HTEH's clients is without merit and would be inimical to the integrity of the judicial process because it would deprive HTEH's clients of the right to independent legal representation." (R 1325.)

Taylor's duty related claims were limited to Riley and HTEH taking positions against his opinion letter. (R 704-13.) The proposed amended complaint which was pending at the time of hearing contained many of the same allegations as the original complaint, did not allege that the redemption transaction was illegal, and did not allege that the opinion letter was incorrect. (R 672-716.) Such allegations could not have been made at that time. None of those positions or operative facts relate to Taylor's claims in the instant case. (R 25-50.) In fact, HTEH and Riley conceded that Taylor's positions were all based on litigation conduct and related torts. (R 1346-50.) Judge Brudie best summed up the transaction that comprised Taylor's claims in *McNichols*:

> Plaintiff's core contention is that Defendants are acting in violation of Idaho's Rules of Professional Conduct by representing all of the corporate defendants in the underlying case and by entering into a joint defense agreement with the other named defendants.

(R 721, 738, 2561-63.) Judge Brudie further held "the conduct and actions of [HTEH and Riley] that form the basis of [Taylor's] claims *are all conduct and actions within the scope of the underlying litigation*." (R 726 (emphasis added).) Judge Brudie never addressed any of the specific allegations in Taylor's proposed amended complaint, but simply held that he asserted the same claims and new derivative claims and that they all failed for the same reasons. (R 731.)

Judge Brudie's decisions in both cases were almost entirely based on the "litigation privilege," as this Court noted. *McNichols*, 149 Idaho at 848. This Court held that Taylor "has

failed to plead facts which allege that [HTEH and Clements Brown] did not accept employment with the AIA Entities in good faith." *Id.* at 843. This Court also held that "it is incredulous that [Taylor] would attempt to assert that the attorneys hired by the AIA Entities, to fight off [Taylor's] litigation against those entities, were being retained for [Taylor's] benefit." *Id.* at 845. When Judge Brudie awarded fees to HTEH and Riley, he held that the "gravamen of [Taylor's] attempted recovery is the alleged acts and/or conduct of the Defendants in representing their corporate clients." (R 757.) When HTEH and Riley moved for reconsideration of Judge Brudie's decision to award fees, Riley's attorney admitted that Taylor's complaint against Clements Brown "involved allegations and issues similar to those asserted" against his clients. (R 1385.)

Clements Brown and Mr. McNichols had nothing to do with the stock redemption transaction in 1995 or the 1995 opinion letter. (R 409-31.) The fact that Clements Brown and Mike McNichols were also defendants and Turnbow and Eberle were not defendants simply confirms that the transaction in *McNichols* was entirely different. (R 383-431.) Similarly, Babbitt, Ashby, and Collins were not named as defendants in this lawsuit for the same reason. (R 25-50.) These facts alone are fatal to Riley, Turnbow and Eberle's *res judicata* argument. Judge Greenwood correctly summarized the differences between the transaction here and the transaction in *McNichols*. (R 561-63.) Riley, Turnbow and Eberle have failed to show that Judge Greenwood erred by ruling and confirming that the transactions were different.

Riley attempts to mislead the Court by selectively quoting the *McNichols'* complaint while omitting material portions of the *McNichols'* allegations, which were on litigation conduct:

The Defendants owed AIA…AIA Insurance, Inc. and/or Reed J. Taylor a duty of

> care to provide, including, but not limited to, reasonable, prudent ethical, unconflicted, loyal and professional legal advice and legal representation in keeping with the standard of care in the legal profession and as owed to the corporations (referred to herein and above as "duty of care"). The Defendants breached their duty of care as a result of their actions and/or omission thereby damaging the corporations and Reed J. Taylor, to the detriment of Reed J. Taylor.

(R 644 ¶62.) As seen by the above quote, Riley's quote was misleading. Riley asserts that "Taylor undertook herculean efforts to prevent dismissal of his complaint by moving to amend his complaint." (Riley Br. at 25.) Riley's citation to the record is to the first page of Taylor's motion to amend and nothing more. (R 699.) Riley also provides many incomplete quotes to the allegations asserted in paragraphs 16, 68, 92, 99, 103, 107 and 188 of Taylor's proposed amended complaint. (Riley Br. at 25-26.) For example, Riley quotes a portion of paragraph 99 of the *McNichols'* complaint, but omits that section of the allegations which demonstrate that the malpractice claim was based on litigation conduct in the AIA case. (R 707-08 ¶99.) The same omissions and misleading quotes appear in the other paragraphs partially quoted by Riley. (R 676-77 ¶16, 697 ¶68, 704-05 ¶92, 709-10 ¶107, 713 ¶118.) In paragraph 16 of Taylor's proposed amended complaint, he referred to a different incorrect opinion letter given to another lender. (R 867-75, 859-61 § 4.2.9(c).) Riley's quote to paragraph 103 of the amended complaint must be read in conjunction with the other paragraphs of that malpractice claim, as it pertained to litigation conduct, not an incorrect letter or a transaction ruled to be illegal. (R 707-08 ¶¶96-104.)

2. Taylor's Claims Here Are Based on Different Operative Facts.

A claim based on facts occurring after a first lawsuit is not one that "might or should have been litigated under the first suit." *U.S. Bank Nat'l Ass'n v. Kuenzli*, 134 Idaho 222, 226, 999 P.2d 877 (2000); *Durant v. Quality First Mktg., Inc.*, 127 Idaho 558, 560, 903 P.2d 147, 149

(1995). (R 2470-82, 2559-63.) In *Kuenzli*, this Court refused to apply *res judicata* because the second lawsuit involved "'material operative facts' comprising a second 'transaction' and allowing a 'second action not precluded by the first.'" *Id.* This Court held that "[t]he Restatement approach allows a second suit to proceed when justified by post judgment developments." *Id.*

> Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first.

Kuenzli, 134 Idaho at 226 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24, cmt. f (1982)); *see also Green v. Gough*, 96 Idaho 927, 930, 539 P.2d 280 (1975); *Mellor v. Chamberlain*, 673 P.2d 610, 613 (WA. 1983). On April 16, 2008, the defense of illegality was raised, for the first time, when it was alleged that AIA had made an illegal shareholder distribution to Taylor in violation of I.C. § 30-1-46. (R 334-44, 2829-35.) On June 13, 2008, AIA made a substantial settlement offer to Taylor, which called into question the merit of the alleged illegality argument. (R 2834-35, 3334-35.) On July 17, 2008, Taylor filed a preliminary response and asserted that I.C. § 30-1-46 was the incorrect statute. (R 1967, 2834.) Taylor's claims in *McNichols* were dismissed on December 23, 2008. (R 480-515.) On February 12, 2009, Connie Taylor asserted for the first time that the stock redemption agreement violated the "earned surplus" restrictions of I.C. § 30-1-6, nearly two months after Taylor's complaints were dismissed in *McNichols*. (480-515, 2070-2115, 2829-35.) The operative facts supporting Taylor's claims here occurred when Judge Brudie ruled that that stock redemption agreement was both illegal and unenforceable on June 17, 2009, six months after the *McNichols* complaints were dismissed. (R 351-65, 480-515.)

In fact, Riley, Eberle and Turnbow admitted the same when they moved to stay this case. (R 1704, 1708-11, 2741-48.) Eberle and Turnbow argued: "the ultimate illegality of the 1995 Stock Redemption Agreement and restructured 1996 Stock Redemption Agreement are central to Plaintiff's causes of action for professional negligence." (R 1710.) Riley also agreed:

> [t]he question of whether or not the redemption agreement was illegal is currently before the Idaho Supreme Court. In the event the Idaho Supreme Court reversed Judge Brudie's decision, then the entire premise of the current case will cease to exist and this case will become moot.

(R 1704.) If the entire basis for Taylor's claims in this case would cease to exist if this Court reversed Judge Brudie, then it was impossible for Taylor to assert his claims in this case until Judge Brudie made the initial ruling that the stock redemption agreement was *both* illegal and unenforceable. Ironically, Riley, Turnbow and Eberle maintain in this lawsuit that "[t]he 1995 Opinion Letter was and is believed by this answering defendant to be correct," based on a number of theories that Taylor unsuccessfully argued. (R 2936, 2984, 2936-44, 2984-86, 2862, p. 97, 2867, p. 115-16, 2868, p. 120, 2886, p. 192-94.) *Taylor*, 151 Idaho at 559-65. It was impossible for Taylor to assert claims that the transaction was illegal or the opinion letter was incorrect until Judge Brudie made that determination on June 17, 2009. *Id.* (R 351-65.) Those operative facts comprise an entirely new transaction to support Taylor's claims here. (R 24-50.)

3. *Res Judicata* Does Not Apply Because there was No Adjudication on the Merits.

Res judicata cannot apply here because Taylor's complaints were not adjudicated on the merits. (R 480-515.) *McNichols*, 149 Idaho at 836-49. Riley, Turbow and Eberle have failed to provide argument and authority for the justiciability issues. This Court should not entertain their arguments. *Forte*, 153 Idaho at 866. (R 1825-26, 1867-79, 2516-29, 2570, 3408-30.)

"[T]he claim preclusion component of *res judicata* does not apply if there has not been a final adjudication on the merits." *Saint Alphonsus Reg'l Med. Ctr. v. Bannon*, 128 Idaho 41, 44, 910 P.2d 155 (1995) (explaining that dismissal for lack of ripeness or standing is not an adjudication on the merits). "Justiciability is generally divided into subcategories-advisory opinions...standing, ripeness, [and] mootness." *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757 (1989). Riley, Turnbow and Eberle have pleaded no justiciable controversy as defenses, which include standing, ripeness and litigation privilege. (R 66, 86, 111, 1798.) *Res judicata* cannot bar Taylor's claims because there was no justiciable controversy in *McNichols*.

In *McNichols*, Taylor's complaints against HTEH (including Riley) and Clements Brown were dismissed on the basis of the litigation privilege and his motions to amend were denied on that same basis. (R 24-50, 486-94, 504-510, 513-14.) An attorney has "qualified immunity" under the litigation privilege until the underlying the litigation has concluded. *McNichols*, 149 Idaho at 836-43; *McKinsey v. Vernon*, 130 Idaho 354, 357, 941 P.2d 326 (1997). Riley, Turnbow and Eberle have asserted "litigation privilege" as affirmative defenses. (R 64, 84, 109, 1796.) HTEH and Riley asserted Taylor's "complaint is deficient because the actions of HTEH in connection with the Underlying Litigation are protected by the litigation privilege." (R 1315-16, 1322, 1345, 1356, 1365, 1367.) Consistent with the qualified immunity granted under the litigation privilege, Judge Brudie dismissed Taylor's claims based on litigation privilege. (R 486.) Judge Brudie explained: "[i]n the instant matter, the conduct and actions of the Defendants, as alleged by Plaintiff, all fall within the scope of the Defendants' representation of their clients and, therefore, fall within the protection of the litigation privilege." (R 492.) The Court held on

appeal that when claims are pursued against opposing counsel, "the action is presumed to be barred by the litigation privilege." *McNichols*, 149 Idaho at 841. Then this Court explained:

> Only when a case has been concluded may one truly identify...whether an attorney has committed malpractice...Therefore, we conclude that a cause of action against one party's opponent's attorney in litigation, based on conduct the attorney committed in the course of that litigation, may not be properly instituted prior to the resolution of that litigation...Until the Underlying case is resolved a court cannot determine whether any tortious act was committed...

Id. at 843. Thus, Taylor's claims in *McNichols* were not decided on the merits. *Id.* It is undisputed that Riley acted as opposing counsel in the AIA litigation and that he, Turnbow and Eberle sought and obtained a protective order in this case based on the *Shelton/Wood* criteria. (R 2688-2738, 2832-33.) Even if Taylor had pled all of his present claims in *McNichols*, those claims were not ripe for adjudication until *Taylor* had concluded. (R 2303-07.)

Taylor's claims in this case were not ripe as in *McNichols* and, therefore, cannot be barred by *res judicata*. *McNichols*, 149 Idaho at 849; *Kuenzli*, 134 Idaho at 226; *Duthie v. Lewiston Gun Club*, 104 Idaho 751, 663 P.2d 287 (1983); *Bannon*, 128 Idaho at 44. Turnbow and Eberle asserted the defense that Taylor's "cause of action is not ripe for controversy given that there is pending [*Taylor*, 151 Idaho 552] before the Idaho Supreme Court." (R 66, 86, 111, 1798.) To plead and prove a malpractice claim, Taylor must prove breach of the duty and the failure to perform the duty was a proximate cause of the damages. *Jordan v. Beeks*, 135 Idaho 585, 590, 21 P.3d 908 (2000). Prior to Judge Brudie's ruling, Taylor could not have pleaded "hypothetical" facts that the stock redemption agreement was both illegal and unenforceable as claims in the *McNichols* litigation. *Miles*, 116 Idaho at 642. (R 351-65.)

Riley, Turnbow and Eberle take inconsistent positions. Nine days after Judge Greenwood denied summary judgment and terminated the discovery stay in this case, Riley, Turnbow and Eberle moved to stay this case again by arguing that Taylor's claims would be mooted if the Court reversed in *Taylor*, 151 Idaho 552. (R 1703-13, 2739-49; Tr. I, p. 143-45, 151-57.) Eberle and Turnbow argued that legality and enforceability of the stock redemption agreement was "central" to Taylor's claims for professional negligence. (R 1710.) Riley agreed. (R 1704.)

If Riley, Turnbow and Eberle believed that Taylor's claims were not ripe after Judge Brudie's ruling because Taylor appealed that decision, then there is no way that his claims could have been ripe before Judge Brudie made his ruling. (R 351-65, 362 n. 15, 366-76.) Moreover, Riley, Turnbow and Eberle maintain that the 1995 Opinion Letter is correct. (R 2831-35, 2936, 2984, 2936-44, 2984-86, 2862, p. 97, 2867, p. 115-16, 2868, p. 120, 2886, p. 192-94.) Riley, Turnbow and Eberle's positions are consistent with this Court's decision that: "[w]e find that in all instances the claims brought by [Taylor]...are not ripe for litigation." *McNichols*, 149 Idaho at 665. This Court explained that: "[t]he clear reasoning behind [*City of McCall v. Buxton*, 146 Idaho 661, 201 P.3d 629 (2008)] was that the cause of action cannot arise until damages are incurred, and the attorney's conduct can be viewed under the totality of the case." *Id.* at 659. Taylor agrees and asserts that his claims did not and could not accrue until the date of Judge Brudie's decision: June 17, 2009. *Id.*; *Jordan*, 135 Idaho at 590; *Mack Fin. Corp. v. Smith*, 111 Idaho 8, 11-12, 720 P.2d 191 (1986).[16] (R 351-65.) Thus, it was factually and legally impossible

[16] In *Mack Financial*, this Court explained that there must be an adverse ruling for the statute of limitations to run and this rationale supports Taylor's position, but does not support Riley, Turnbow and Eberle's positions.

for Taylor to prove breach or proximate cause until Judge Brudie's decision. (R 351-65.)

Taylor's claims in this case were simply not ripe for litigation at the time of *McNichols*. This determination does not affect the timeliness of Taylor claims, but only moves the accrual date for the claims from April 2008 to June 17, 2009. (R 1688.) Once Riley availed himself of the litigation privilege, the statute of limitations was tolled until the underlying case was concluded. Having obtained an advantage through staying this case based on the position that Taylor's claims were not ripe or would be moot and by now taking the inconsistent position that Taylor's claims were ripe or not moot, Riley, Turnbow and Eberle should be judicially estopped from asserting *res judicata*. *McKay v. Owens*, 130 Idaho 148, 155, 937 P.2d 1222 (1997).

Taylor's claims were dismissed for lack of standing, so his claims cannot be barred by *res judicata*. *Bannon*, 128 Idaho at 44; *Gilbert v. Nampa Sch. Dist. No. 131*, 104 Idaho 137, 140-41, 657 P.2d 1 (1983). In *McNichols*, HTEH's and Riley's motions to dismiss argued that Taylor lacked standing. (R 1310-12, 1315, 1345, 1347, 1365.) Judge Brudie dismissed Taylor's malpractice claims due to lack of standing and held that Taylor's amended complaint failed for the same reasons as his original one. (R 493, 511, 731.) This Court held on appeal that Taylor lacked standing to assert malpractice claims. *McNichols*, 149 Idaho at 845.

Here, Taylor does not assert malpractice claims based on his status as a secured creditor or a stock pledgee. (R 24-50.) His claims are based on his status as a party injured by an inducement to sell his shares based on an incorrect opinion letter. This injury conferred standing on Taylor to assert his claims on June 17, 2009 and thus his claims are not barred by *res judicata*. (R 1685, 2567-70.)

4. The Parties and Their Capacities Are Not the Same.

"To be in privies, a person not a party to the former action must 'derive his interest from one who was a party to it, that is, ...he [must be] in privity to that judgment." *Stanion*, 144 Idaho at 124. There is no privity when "[t]he judgment in the first action was based on a defense that was personal to the defendant in the first action." RESTATEMENT (SECOND) OF JUDGMENTS § 51(1)(b) (1982). Judge Greenwood ruled "that res judicata cannot apply to the Defendants Turnbow and Eberle Berlin because they were not parties to the earlier litigation." (R 3434, 2561.) Riley's privity was with HTEH, not Eberle and Turnbow. Riley's defenses of the litigation privilege and lack of standing in *McNichols* were personal only to him as AIA's attorney at that time.

Turnbow and Eberle were in conflict with Riley and HTEH's arguments that the stock redemption agreement was illegal. AMJUR JUDGMENTS § 589. (R 2763-64, 2984.) Indeed, Riley held conflicting positions in his *capacity* as counsel for AIA that the stock redemption agreement was illegal, while *personally* and on behalf of Eberle maintaining the transaction was legal and the opinion letter was correct. (R 116 ¶4, 345-50, 565-66, ¶10, 1719-22, 2712, 2936-44, 2984-86.) It would be fundamentally unfair to have Riley, Turnbow or Eberle in privity with any of the defendants in *McNichols*. There is no privity for *res judicata* to apply in the instant case.[17]

D. Taylor Did Not Waive His Claims through the Illegal 1996 Restructure Agreement.

Judge Greenwood agreed with McDermott that Taylor's "shares had already been redeemed" in 1995 and "the 1996 agreement is void as a document in furtherance of the illegal

[17] *St. Paul Fire and Marine Ins. Co. v. Taylor*, 974 P.2d 611, 618-19 (Kan. Ct. App. 1999).

1995 agreement [and] [t]o give effect to the 1996 agreement would be to give effect to the 1995 agreement." (R 2564, 3384-84 ¶e; App. B, 7-8.) Riley, Turnbow and Eberle argue on appeal that Taylor waived his right to sue on the opinion letter based on his execution of the 1996 stock redemption restructure agreement. (Riley Br. at 30-34; Eberle Br. at 22-28.)

Turnbow and Eberle waived this issue on appeal because they did not provide both argument and authority in their brief. *Forte*, 153 Idaho at 866. They failed to provide any argument *and* authority that Taylor "relinquished a right or advantage" or that they acted in reliance or "altered their positions" in any way. *See Knipe Land Co. v. Robertson*, 151 Idaho 449, 457, 259 P.3d 595, 603 (2011). Riley, Turnbow and Eberle have waived the issue because they do not provide any authority to overrule this Court's decision that the 1995 and 1996 redemption agreements were illegal and unenforceable. *Id.*; *Taylor*, 151 Idaho 552.

The Court has already ruled that *both* the 1995 stock redemption agreement and the 1996 stock redemption restructure agreement were illegal and unenforceable. *Taylor*, 151 Idaho 552. In *Taylor*, the Court included the 1996 Stock Redemption Restructure Agreement in the definition of "Stock Redemption Agreement" when it ruled that both agreements were illegal and unenforceable. *Id.* at 558, 559-67. The Court also affirmed the judgment entered by Judge Brudie dismissing all of Taylor's breach of contract claims, which included the contract claims on the $6M Note. *Id.* at 573-74. (R 854-56, 2409-19.) On remand, Judge Brudie dismissed Taylor's remaining claims. (R 2834-36 ¶20.) The Court's decision followed Idaho law that "[a] new promise based on an illegal, invalid consideration cannot validate the original transaction or any part of it...[and] [t]he courts cannot lend their aid to enforcement of a claimed indebtedness

based entirely on an illegal consideration." *Fowler v. Cheirrett*, 69 Idaho 224, 226, 205 P.2d 502 (1949). There is no credible dispute whether the 1995 agreement and the 1996 agreement are illegal. There are judicial findings of illegality and unenforceability. (R 351-65, 357 n. 8.)

Turnbow and Eberle argue that Judge Greenwood "interpreted Judge Brudie's ruling too broadly" by "finding that the promissory note was illegal." (Eberle's Br. at 26.) The $6M Note was an exhibit to, and incorporated by reference into, the 1995 stock redemption agreement. (R 2174 §2.1.2, 2188 §§9.10-9.11.) Judge Brudie entered judgment dismissing Taylor's contract claims, including the $6M Note, based on the illegality of the 1995 stock redemption agreement. (R 854-57, 2409-19.) Any argument that the $6M Note is still enforceable lacks merit.

This Court rejected Taylor's attempt to enforce the 1995 stock redemption agreement through the release provision in the 1996 stock redemption restructure agreement. *Taylor*, 151 Idaho at 570. For that reason, even if the 1996 stock redemption restructure agreement contained a release or waiver of claim, it too would be illegal and unenforceable. Judge Greenwood correctly ruled that Riley, Turnbow and Eberle "were not parties to that agreement," so there could be no waiver of claims, in any event. (R 2563, 2311 §3.)

Even if the 1996 stock redemption restructure agreement was enforceable, Judge Greenwood correctly ruled that "there is nothing withdrawing the opinion letter as it relates to the [$6M Note]." (R 2563-64.) The 1996 stock redemption restructure agreement excludes the original $6M Note and does not mention the opinion letter. (R 2306 §C.) The opinion letter was not one of the "Original Documents" and the $6M Note was expressly excluded as one of the "Superseded Documents." (*Id.*) The opinion letter remained valid and the $6M Note unchanged.

(*Id.*; R 2193-94, 824-28.) The opinion letter specifically addressed the enforceability and legality of the $6M Note. (R 824.) The $6M Note was ruled unenforceable. (R 855, 2409-10.)

The security interests granted to Taylor to secure the payment of "any and all obligations" also remained unchanged, specifically "all commissions from the sale of insurance or related services...and any interest thereon" and "AIA Services agrees to grant to [Taylor]...a security interest in all right and title to...the Shares" (which included Taylor's irrevocable right to vote the shares or transfer them upon default). (R 2195 §C, 2196 §1, 2207 §C, 2208 §§1-2, 2306 §§1.2-1.3, 2324 §§1-2, 2337 §§A-C, 2338 §§1-2.) Moreover, the opinion letter warranted that Taylor had a perfected security interest in all of the shares pledged to him. (R 826.)

Although Turnbow and Eberle failed to cite any authority, Riley mistakenly relies on *Isaak v. Idaho First National Bank*, 119 Idaho 988, 812 P.2d 295 (Ct. App. 1990)—a case that Judge Greenwood also found did not apply. (R 2563.) In *Isaak*, a new party to a modified contract asserted issues of duress, lack of consideration and fraud. *Isaak*, 119 Idaho 988-90. The holding in *Isaak* provides no authority for the proposition that an illegal contract is enforceable or that a modified contract can supersede and replace documents or claims that were not mentioned in the modified agreement. There are no terms in the 1996 stock redemption restructure agreement that support Riley, Turnbow and Eberle's arguments, even if the 1996 agreement was legal and enforceable. (R 2306-13.)

Riley, Turnbow and Eberle have not cited any authority for the proposition that the 1996 stock redemption restructure agreement did not proximately cause Taylor's damages. *Forte*, 153 Idaho at 866. This is because they would need to admit a duty exists in order to reach the element

of proximate causation. Judge Greenwood correctly ruled that "had Taylor not entered into the 1995 agreement there could not be a 1996 agreement...[and] Taylor claims he relied on the defendants' advice in entering into the 1995 agreement." (R 2565.) Taylor testified that he would not have sold his shares without that opinion letter. (R 816.)

Riley also incorrectly argues that the 1996 stock redemption restructure agreement is the "controlling document." (Riley Br. at 34.) A review of Taylor's complaint against Cairncross shows that he is not asserting that the 1996 agreement was the "controlling document."[18] (R 1832-47.) In that lawsuit, Taylor asserted that Cairncross failed to get a new opinion letter because Riley, Turnbow and Eberle have raised that issue here and because Cairncross attempted to hide behind the 1995 opinion letter to support the argument that it properly discharged its duties to Taylor in 1996. *Id.*; (Tr. II, p. 56, L. 8-10.) McDermott testified that Appellants possessed different duties to Taylor than those of independent counsel. (R 3386 n. 2; App. B, p. 9 n.2.) Riley, Turnbow and Eberle failed to submit expert opinions to rebut McDermott. Judge Brudie previously ruled that the illegality was determined in 1995 and not in 1996. (R 357 n. 8.)

E. The 2006 Subordination Is Irrelevant Because the Redemption Was Illegal in 1995.

Judge Greenwood agreed with Taylor's expert witness when he ruled that the 2006 subordination agreement between Taylor and his ex-wife, Donna, was "irrelevant" and "the [1995] agreement was already in violation of Idaho law, despite any later subordination agreement." (R 2566, 2385-87, 3384-84 ¶c; App. B, p. 7-8 ¶c.) Riley, Turnbow and Eberle posit that, prior to Taylor and his ex-wife entering into a subordination agreement in 2006, the

[18] Taylor has a right to sue all of the responsible parties and to be made whole. *Sohn v. Foley*, 125 Idaho 168, 172, 868 P.2d 496 (Ct. App. 1994).

redemption of Taylor's shares was legal under the "fail-safe" clause because "AIA's promise to pay Taylor for his common stock was contractually subordinated to AIA's obligations to pay Donna Taylor." (Riley Br. at 35; Eberle Br. at 29.) Turnbow and Eberle fail to cite any authority for their "fail-safe"[19] argument. *Forte*, 153 Idaho at 866. Riley cites only inapplicable authority and therefore cannot support his argument on appeal. *Id.*

Idaho law does not authorize the redemption of shares, "whether direct or indirect," through the issuance of indebtedness that is subordinate to the indebtedness of another shareholder. I.C. § 30-1-6; I.C. § 30-1-2. In 1995, Taylor's shares were redeemed and cancelled. (R 2174 §2.1.2.) AIA issued indebtedness to Taylor under the $1.5M Note and the $6M note. (*Id.*) AIA transferred aircraft to Taylor and also gave him addition consideration for the transaction. (*Id.*) This Court already rejected the argument of paying over time as being proper:

> We hold that I.C. § 30-1-6 allows redeeming stock on credit, but the earned and capital surplus restrictions still apply...Nothing in I.C. § 30-1-6 suggests that the timing of payment has any bearing on the statute's applicability, and given the statute's purpose, it would be an absurd result to allow a corporation to get around these restrictions by simply paying on a later date.

Taylor, 151 Idaho at 563. Relying on the Court's ruling in *Taylor*, Judge Greenwood ruled that the 2006 agreement had nothing to do with the issuance of the 1995 opinion letter. (R 2566.) Professor McDermott also testified that "any subordination issues are irrelevant because the original transaction was illegal." (R 384-84 ¶c.)

Even if Idaho Code Section 30-1-6 authorized AIA "to get around these restrictions" by subordinating the principal on the $6M Note, Riley, Turnbow and Eberle's arguments fail

[19] Riley referred to the argument as the purported "fail-safe" clause. Thus, so did Judge Greenwood.

because Taylor received a $1.5M Note, airplanes worth almost $1 million, other consideration; AIA was still obligated to pay the interest payments on his $6M note that were not subordinate to AIA's obligations to Taylor's ex-wife. (R 2174 §2.1.2.) *Taylor*, 151 Idaho at 563. This Court has already ruled that the entire transaction was illegal and unenforceable. *Taylor*, 151 Idaho 559-67. Taylor and his ex-wife could not "contractually" subordinate their respective indebtedness because AIA's indebtedness to Taylor was illegal and unenforceable. *Id.* Contrary to Riley, Turnbow and Eberle's allegations, the entire indebtedness to Taylor was not contingent and was referenced as debt on AIA's financial statements. (R 3336-3377.) Thus, the 2006 subordination agreement between Taylor and his ex-wife is irrelevant because "[t]he courts cannot lend their aid to enforcement of a claimed indebtedness based entirely on an illegal consideration." *Fowler*, 69 Idaho at 226. (R 2385-87.)

Taylor's ex-wife received all of the outstanding Series A Preferred Shares in connection with their divorce. This required AIA's articles of incorporation to be amended to protect her. (R 2165-66 ¶53, 3069, 3095-3124, 3067-3135.) AIA's amended articles contain several restrictive "Covenants" and if certain payments to Taylor's ex-wife were in default or if any of those "Covenants" were violated, AIA was barred from transacting in certain ways, including the purchase of stock, without her consent. (R 1932-36 §4.2.9(a)-(k), 1935 §4.2.9(f), 1939 §4.2.12.) Riley admitted that Donna Taylor's consent to the redemption of Taylor's shares was required. (R 2166 ¶53.) AIA sought and obtained her consent as required. (R 2177 §3.2.)

Donna Taylor's consent has nothing to do with the purported "fail-safe" clause. A review of the agreements shows that AIA simply sought her consent and gave her additional concessions

in exchange for it. (R 2363-82.) No agreement stands for the proposition that the "fail-safe" clause authorized or restricted Taylor's redemption. *Id.* Moreover, the opinion letter contains opinions that affirmatively reject the "fail-safe" clause. (R 824-28; App. A.) The fact that Taylor received security interests with no conditions proves the "fail-safe" is fundamentally flawed and that the entire redemption was illegal. (*Id.*; R 2166-67, 2172-2215.) Judge Brudie explained, "AIA could prevent Reed Taylor from ever having a legal remedy for non-payment of the $6 million Note by leaving as little as one cent unpaid on the debt owed to Donna Taylor. Such an interpretation would result in a legal absurdity." (R 1273.) Judge Brudie rejected all of Riley's arguments, including the *Culp* and *Blickenstaff* cases that Riley cites on appeal. (R 1234-37.) Those cases do not apply because their premise is that both parties are actually creditors, as Taylor is allegedly owed a "contingent obligation." Notably, when Taylor and his ex-wife signed the 2006 subordination agreement, both of their respective debts had matured and AIA had intentionally not paid either of them. Judge Brudie's holding that Taylor and his ex-wife could enter into the subordination agreement was consistent with I.C. § 30-1-640(6). (R 1232-37.)

Riley, Turnbow and Eberle assert that "Taylor proximately caused his own damages." Although they have waived any arguments as to proximate cause because they have failed to cite any authority, it is well-settled that "[t]he question of proximate cause is one of fact and almost always for the jury." *Cramer v. Slater*, 146 Idaho 868, 875, 204 P.3d 508 (2009). A plaintiff need only show that he had "some chance of success." *Jordan*, 135 Idaho at 590. However, Judge Brudie already rejected Riley, Turnbow and Eberle's arguments on the subordination issue and Taylor obtained partial summary judgment of the default of the $6M Note. (R 1174-90, 1232-

37.) Thus, Taylor would have been successful but for the illegality. (R 1174-90, 3384 ¶¶c-d.)

The "fail-safe" clause caused the opinion letter to be misleading because it does not have the required reasoning to explain the "fail-safe" clause, as Riley conceded in 2012. (R 2873, p. 140, L. 23-24.) The TriBar guidelines are instructive. They provide:

> An opinion the opinion preparers believe to be misleading should not be delivered until ***disclosures*** are made to cure the problem...When considering if an opinion to be given will mislead the opinion recipient, opinion preparers must think not only about the opinion itself but also about areas excluded from the opinion...The question the opinion preparers must consider is whether under the circumstances the opinion will cause the opinion recipient to misevaluate the specific opinion.

TriBar II, 56 Bus. Law. at 602-03. Significantly, Riley, Turnbow and Eberle never disclosed the "fail safe" or "subordination" reasoning in the opinion letter. (R 824-28, 2873, p. 140.) Taylor could not know that he should not enter into the subordination agreement with his ex-wife if he had never been advised about the "fail-safe" clause. As McDermott opined:

> [T]he defendants' assertions that the redemption of Reed Taylor's shares was legal because certain payments were subordinate to payments to Donna Taylor is not supported by any provision in I.C. § 30-1-6 or I.C. § 30-1-2...There are no disclosures, assumptions, qualifications or exceptions in the Opinion Letter that insulate Mr. Riley, Mr. Turnbow or Eberle Berlin from any of the incorrect opinions or their failure to prepare and deliver the Opinion Letter in a non-negligent manner. Indeed, if the Opinion Letter had disclosed that it was based on the so-called "fair value" test or some other analysis to which Mr. Riley has testified to justify the compliance with I.C. § 30-1-6 (1995), rather than the plain language of that statute, a reasonable opinion recipient would have insisted on a shareholder vote to permit the use of capital surplus and thus avoid any ambiguity or uncertainty with respect to the legality of the Stock Redemption Agreement.

(R 3385-86 ¶¶e-f; App. B, p. 7-9 ¶¶e-f.) Thus, the opinion letter was misleading because it contained no reasoning with respect to the "fail-safe" clause. Tri Bar II, 56 Bus. Law. at 602-03.

F. <u>The Illegality Doctrine Does Not Apply.</u>

In violation of the Court's order, Riley asserts, for the first time on appeal, that the illegality doctrine, or more accurately, the *in pari delicto* defense bars Taylor's claims. (Riley Br. at 9-10.) This argument is being raised for the first time on appeal and it exceeds the scope of the order granting the permissive appeal. *Rountree*, 296 P.3d at 376; *Forte*, 153 Idaho at 866. (R 1866-90, 2516-29, 2556-71.) Turnbow and Eberle did not join in Riley's illegality argument.

The illegality doctrine does not apply. The Court has already ruled the stock redemption agreement was *both* illegal and unenforceable. *Taylor*, 151 Idaho 552. "The [illegality] doctrine normally applies as a common law defense against a party seeking to enforce an illegal contract." *Trees v. Kersey*, 138 Idaho 3, 9, 56 P.3d 765 (2002). "This rule applies on the ground of public policy to every contract which is founded on a transaction prohibited by statute." *Id.* at 6. However, "when a plaintiff can maintain his cause of action without the aid of an illegal act or an illegal agreement, he will be entitled to recover." *Trees*, 138 Idaho at 9; *McConnon v. Holden*, 35 Idaho 75, 204 P. 656, 657 (1922).

Here, the opinion letter was not an illegal instrument nor was it an illegal act. Taylor is not seeking to enforce the stock redemption agreement. (R 41-43, 824-28, 1685, 2567-70, 3384-86.) Taylor's claims are based on the incorrect opinion letter and advice contained in the letter. *Id.* The opinion letter wrongly advised Taylor that the redemption did not violate any laws and that all necessary shareholder consent had been obtained. *Id.* Riley's duties Taylor through the opinion letter arose "out of the contract between [Riley] and [AIA]"—which is not an illegal contract. *Harrigfeld*, 140 Idaho at 137. As this Court explained in *Buxton* when the attorneys there made a similar argument to Riley's, "[t]he contract between the City and its current

attorneys is not contrary to public policy. There is no public policy prohibiting a city from hiring legal counsel, or banning it from filing a legal malpractice action against its former Attorneys." *Buxton*, 146 Idaho at 666. As in *Buxton*, the arrangement between Riley, Turnbow, Eberle and AIA to provide the opinion letter to Taylor was not illegal. And as in *Buxton*, there is no public policy prohibiting Taylor from filing a lawsuit here after that opinion letter turned out to be wrong. Simply put, there was nothing illegal about Riley, Turnbow and Eberle providing Taylor an opinion letter. Just like there is nothing illegal about Taylor suing them because the opinion letter was incorrect. It would be illogical and against public policy for Riley, Turnbow and Eberle to avoid liability for malpractice under these circumstances. *Farrell v. Whiteman*, 146 Idaho 604, 612, 200 P.3d 1153 (2008). The transaction to redeem Taylor's shares should have been legal, which distinguishes this case from the facts of other cases. As McDermott explained:

> As general counsel for AIA Services Corporation, Riley, Turnbow and Eberle Berlin were in a position to see to it that all applicable legal requirements were complied with for the redemption of Reed Taylor's shares...
>
> As general counsel for AIA...Riley, Turnbow and Eberle Berlin had two opportunities, prior to closing, to have the shareholders of AIA...authorize an amendment to the articles of incorporation to authorize the redemption of Reed Taylor's shares by authorizing the use of capital surplus as permitted by I.C. § 30-1-6. As general counsel for AIA...Riley, Turnbow and Eberle Berlin had two opportunities, prior to closing, to have the shareholders vote on shareholder resolutions authorizing the redemption of Reed Taylor's shares and the use of capital surplus as permitted by I.C. § 30-1-6.
>
> Indeed, if the Opinion Letter had disclosed that it was based on the so-called "fair value" test or some other analysis to which Mr. Riley has testified to justify the compliance with I.C. § 30-1-6 (1995), rather than the plain language of that statute, a reasonable opinion recipient would have insisted on a shareholder vote to permit the use of capital surplus and thus avoid any ambiguity or uncertainty with respect to the legality of the Stock Redemption Agreement.

(R 3384, 3386.) McDermott's opinions are consistent with the Court's finding that no shareholder resolution was passed authorizing capital surplus and that "it appears that none of the parties recognized the potential violation of I.C. § 30-1-6." *Taylor*, 151 Idaho at 565, 567.

Riley is trying to do exactly what the illegality doctrine prohibits—derive a benefit from the illegal stock redemption agreement. "[O]ne not a party to an illegal contract cannot, as a general rule, derive any benefit from the contract." *Zollinger v. Carrol*, 137 Idaho 397, 400, 49 P.3d 402 (2002). Riley, Turnbow and Eberle would obtain an improper benefit from the illegal 1995 stock redemption agreement if they were permitted to avoid liability for wrongly advising Taylor to enter into the transaction. It would be absurd to empower attorneys to advise clients or non-clients to enter into illegal transactions knowing that the attorneys could rely on the illegality doctrine to avoid malpractice. Also, Riley, Turnbow and Eberle's obligations to Taylor through the opinion letter can be severed from the illegal transaction. *Farrell*, 146 Idaho at 611.

Riley relies upon the wrong defense. In the context of a legal malpractice action, the "*in pari delicto* defense" was adopted in Idaho in *Sohn*, 125 Idaho at 171. In that case, the district court applied the defense to dismiss Sohn's malpractice claim against Foley because it was based on a "scheme" to defraud Sohn's ex-wife out of an insurance policy. *Id.* The Idaho Court of Appeals reversed and ruled that it was for the trier of fact to determine whether Sohn's intent was to deprive his ex-wife of the insurance policy through fraud. *Id.* at 171-72.

The application of the *in pari delicto* defense applies to instances of fraud or perjury, which are not present here. *See Sohn*, 125 Idaho at 171; *Choquette v. Isacoff*, 836 N.E.2d 329

(Mass. Ct. App. 2005) (applying the defense to perjury); *Pantely v. Garris, Garris & Garris, P.C.*, 447 N.W.2d 864 (Mich. Ct. App. 1989). Here, the facts do not support the application of the *in pari delicto* defense. This Court has already ruled, "it appears that none of the parties recognized the potential violation of I.C. § 30-1-6." *Taylor*, 151 Idaho at 567. Judge Brudie, Judge Greenwood, and this Court have never made a determination whether Taylor's malpractice claims based on the opinion letter were barred by the *in pari delicto* defense. Such analysis fundamentally differs from the analysis pertaining to the enforcement of an illegal redemption agreement. *Taylor*, 151 Idaho at 566.

In 2012, Riley admitted that Taylor did not use his majority interest to effectuate a preferential transaction for himself. (R 2684.) Riley also testified that he based the opinions in the letter on the "fair value," and other purported reasons—none of which were reasoned in the opinion letter nor ever disclosed to Taylor. (R 2861, p. 90, 2873, p. 138-41, 3384, 3386.) Taylor had no knowledge of the illegality and relied heavily on the opinion letter. (R 362 n. 15, 813-19.) Indeed, Riley's attorney billed an entry on October 30, 2010: "Analysis of whether deposition of Riley, if allowed could be used in underlying case currently on appeal." (R 2774.) Finally, Taylor's independent counsel (who Taylor also asserted claims against),[20] testified that neither he nor Taylor knew the redemption violated any laws and that he would have advised Taylor not to sell his shares if he knew any laws were violated. (R 1399-1400, 1895-1911.) Thus, it would be futile to allow Riley to even assert this defense on remand. *McNichols*, 149 Idaho at 847.

G. Riley, Turnbow and Eberle Are Not Entitled to Attorneys' Fees.

[20] Taylor waived all attorney-client privilege with Scott Bell and Cairncross and produced their files in their entirety to Riley, Turnbow and Eberle.

Riley, Turnbow and Eberle request attorney fees pursuant to I.C. § 12-120(3). Riley, Turnbow and Eberle have failed to cite to "parts of the transcript and record relied on," so "this Court should not address the [request for fees]" on appeal. *Id.*; *Wilder v. Miller*, 135 Idaho 382, 387, 17 P.3d 883 (2001). Moreover, Turnbow and Eberle failed to provide any argument as to what commercial transaction or relationship supported their request.

The Court already found that the redemption of Taylor's shares was a commercial transaction, but it refused to award fees because: "[w]hile both parties' claims are based upon the commercial relationship between them, neither party should be permitted to claim the benefit of I.C. § 12-120(3)." *Taylor*, 151 Idaho at 574. Riley, and presumably Turnbow and Eberle, rely on that same illegal commercial transaction between Taylor and AIA for their request for fees. However, in order to be awarded fees for a malpractice action, "a commercial transaction [must have] occurred between the prevailing party and the party from whom that party seeks fees." *Reynolds v. Trout Jones Gledhill Fuhrman P.A.*, 154 Idaho 21, __, 293 P.3d 645, 650 (2013). In addition, fees may be awarded "as long as a commercial transaction is at the center of the lawsuit." *Id.* However, "[t]he commercial transaction was illegal." *Taylor*, 151 Idaho at 574. (R 351-365, 2172-2223.) Riley, Turnbow and Eberle are not entitled to fees, as also noted by Judge Brudie in *McNichols* when Riley requested fees under I.C. § 12-120(3). *Id.* (R 758 n. 3.) Riley, Turnbow and Eberle are barred from being awarded fees because "[o]ne not a party to an illegal contract cannot, as a general rule, derive any benefit from the contract." *Carrol*, 137 Idaho at 400. They improperly seek to benefit from the illegal stock redemption agreement. *Id.*

For Riley, Turnbow and Eberle to avail themselves of the right to request fees under I.C.

§ 12-120(3), they must have conceded and argued that there was a direct commercial relationship between them and Taylor—but they have done neither because that would require them to admit that a duty is owed to Taylor. Since there is "no direct commercial relationship between" Riley, Turnbow, Eberle and Taylor they "are not entitled to attorney fees under I.C. § 12-120(3)." *Emp'rs Mut. Cas. Co. v. Donnelly*, 154 Idaho 499, __, 300 P.3d 31, 38 (2013).

Riley, Turnbow and Eberle's request for fees is also premature because the appeal is permissive and "any determination of the prevailing party is premature until the case is finally resolved." *Buxton*, 146 Idaho at 667. Riley actually concedes this point. Moreover, Taylor could still pursue a motion for reconsideration on other issues on remand. *See* I.R.C.P. 11(a)(2). Even if they were entitled to fees, the issue is one for remand.

H. Taylor Should Be Awarded Attorneys' Fees and Costs on Appeal.

This Court should reserve an award of attorney fees to Taylor on appeal for a determination on remand pursuant to I.C. § 12-120(3). Attorneys' fees may be awarded pursuant to I.C. § 12-120(3) for a legal malpractice action when there is a commercial relationship between parties or the claims are based on a commercial transaction. *Reynolds*, 293 P.3d at 650; *Donnelly*, 300 P.3d at 38.

Taylor asserts that Riley, Turnbow and Eberle owed him duties through the opinion letter and that letter was created through a legal commercial relationship and/or commercial transaction between them and AIA. (R 41-43, 824-28, 1685, 1709, 2567-70, 3385-86; App. A-B, p. 8-9.) *Buxton*, 146 Idaho at 666; *Soingnier v. Fletcher*, 151 Idaho 332, 326, 256 P.3d 730 (2011) ("the prevailing party may be entitled to attorney fees under I.C. § 12-120(3) in an action

for legal malpractice so long as a commercial transaction occurred between the prevailing party and the party from whom that party seeks fees"). Taylor's relationship with Riley, Turnbow and Eberle was a legal commercial transaction or relationship and he is entitled to attorney fees. *Id.*

Taylor asserts that he should also be awarded fees for the illegal commercial transaction between he and AIA because Riley, Turnbow and Eberle acted in the dual role of being general counsel for AIA and the authors of the opinion letter to Taylor. (R 824, 3384 ¶¶c-d; App. B, p. 7 ¶¶c-d; App. A, p. 1.) *N. Butte Min. Co.*, 4 F.Supp. at 713 ("It is of an ancient maxim that general counsel cannot thus delegate his duties of skill and discretion by the corporation delegated to him"). It was not illegal for AIA to repurchase Taylor's shares. It was only illegal because a shareholder resolution was not obtained by Riley, Turnbow and Eberle—AIA's general counsel and the authors of the opinion letter. *Id.*; I.C. § 30-1-6. (R 824; App. A, p. 1.) In other words, the transaction to redeem Taylor's shares should have complied with I.C. § 30-1-6 and should have been legal and enforceable, which distinguishes the present case from other illegal transactions. *Taylor*, 151 Idaho at 574; I.C. § 30-1-6. Riley, Turnbow and Eberle would derive a benefit from their negligent work for the redemption if they were permitted to avoid paying Taylor's fees. *Carrol*, 137 Idaho at 400. (R 824-28; App. A.) Moreover, awarding fees to Taylor would be consistent with ensuring that an injured party receives "the difference between the client's actual recovery and the recovery which should have been obtained but for the attorney's malpractice." *Sohn*, 125 Idaho at 172; *Buxton*, 146 Idaho at 666. It would be inequitable and against public policy to allow Riley, Turnbow and Eberle to avoid paying Taylor's attorneys' fees for their malpractice. *Id.*; *Farrell*, 146 Idaho at 612. However, it is premature for this Court to award fees

on appeal pursuant to I.C. § 12-120(3). *Buxton*, 146 Idaho at 667. This Court should reserve an award fees to Taylor if he is the prevailing party on remand and award him costs. I.A.R. 40(a).

V. CONCLUSION

This Court should affirm Judge Greenwood's ruling that Riley, Turnbow and Eberle owed duties to Taylor through all of the correct theories. Riley, Turnbow and Eberle's other arguments fail. Taylor's request for fees should be reserved for remand and award him costs.

DATED: November 6, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of November, 2013, I caused to be served, pursuant to agreement of the parties, two true and correct copies of the foregoing document to the following parties via email and U.S. Mail, postage prepaid:

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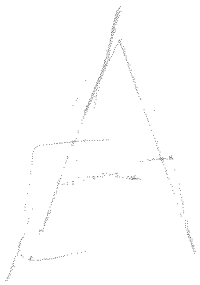

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JAMES L. BERLIN
OF COUNSEL
T. H. EBERLE (1918-1977)

August 15, 1995

Reed J. Taylor
P.O. Box 538
Lewiston ID 83501

Re: Common Stock Redemption

Dear Mr. Taylor:

This opinion is being delivered to you pursuant to Section 2.5(j) of the Stock Redemption Agreement dated July 22, 1995 ("Agreement") by and between AIA Services Corporation, an Idaho corporation ("Company") and Reed J. Taylor . All capitalized terms not defined herein shall have the respective meanings ascribed to them in the Agreement. The phrase "Transaction Documents" refers collectively to the Agreement, together with the Note, the Pledge Agreement, the Security Agreement, the Consulting Agreement and the Noncompetition Agreement, as such documents are defined in the Agreement.

We have acted as general counsel for the Company in connection with the transactions contemplated by the Agreement. As such general counsel, we have assisted in the negotiation, and have examined executed counterparts (or photostatic copies of executed counterparts) of the Agreement and other Transaction Documents.

In addition, we have examined originals, executed counterparts or copies of such agreements, corporate records, instruments and certificates, certificates of public authorities and such matters of law as we have deemed necessary for the purpose of rendering the opinions set forth herein. To the extent we deemed necessary for the purposes of this opinion, we have relied upon (i) the statements and representations of the Company as to factual matters, (ii) the corporate records provided to us by the Company, and (iii) certificates and other documents obtained from public officials. We have further relied as to factual matters on the representations and warranties contained in the Agreement and the other Transaction Documents (including, without limitation, Mr. Taylor's representations in Article IV of the Agreement) and on the Company's representations in Schedule III (attached) to the Agreement; and we have assumed the completeness and accuracy of all such representations and warranties as to factual matters. We have assumed the genuineness of all signatures (other than those of the Company), the legal capacity of Mr. Taylor to execute the Agreement and all other documents we have reviewed, the authenticity of all documents submitted to us as originals, and the conformity to original documents of all documents submitted to us as certified, photostatic, reproduced or conformed copies. We have further assumed that the Agreement and the other Transaction Documents have

Exhibit - A -1

been duly authorized, executed and delivered by Mr. Taylor and are enforceable against him in accordance with their respective terms, and that the execution, delivery and performance of the Agreement and the other Transaction Documents by Mr. Taylor does not and will not result in a breach of, or constitute a default under, any agreement, instrument or other document to which Mr. Taylor is a party, or any order, judgment, writ or decree applicable to such party to which Mr. Taylor's property is subject.

Whenever our opinion with respect to the existence or absence of facts is indicated to be based on our knowledge, we are referring to the actual knowledge of R. M. Turnbow and Richard A. Riley, who are the sole attorneys in Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered who have represented the Company during the course of our representation in this transaction. Except as expressly set forth herein, we have not undertaken any independent legal or factual investigation to determine the existence or absence of such facts, and no inference as to our knowledge of the existence or absence of such facts should be drawn from such representation.

Based upon and subject to our examination and assumptions as aforesaid and subject to the qualifications hereinafter set forth, we are of the opinion that, except as set forth in the attached Schedule III and/or the Schedules attached to the Agreement:

1. The Company is a corporation duly organized and validly existing under the laws of the State of Idaho. Based solely on the attached Certificates of Corporate Status issued by the Idaho Secretary of State, the Company, The Universe Life Insurance Company ("Universe"), AIA Insurance, Inc. ("AIAI") and Farmers Health Alliance Administrators, Inc. ("Farmers") are corporations incorporated under the corporation laws of the State of Idaho and in good standing on the records of the Idaho Secretary of State.

2. The Company and its Subsidiaries have full corporate power and authority to enter into, execute and deliver the Transactions Documents and to perform their respective obligations thereunder; all corporate action on the part of Company and its Subsidiaries, and their respective directors and shareholders, necessary for the authorization, execution, delivery and performance by Company and its Subsidiaries of the Transaction Documents and the consummation of the transactions contemplated thereby has been taken; and the Transaction Documents have been duly executed and delivered by Company and its Subsidiaries. The Transaction Documents constitute the valid and binding obligation of Company and its Subsidiaries enforceable against them in accordance with their respective terms, except that enforceability may be limited by (a) applicable bankruptcy, insolvency, moratorium, reorganization, fraudulent transfer, receivership, conservatorship or similar laws affecting creditor's rights generally, (b) the exercise of judicial discretion in accordance with general principles of equity (whether applied by a court of law or equity) and (c) considerations of public

policy.

3. Neither the execution and delivery of the Transaction Documents by Company and its Subsidiaries, nor the consummation of the transactions contemplated thereby, will (a) conflict with or violate any provision of their respective Articles of Incorporation or Bylaws, as amended; or (b) constitute a violation or default under any indebtedness, indenture, mortgage, deed of trust, note, bond, license, lease agreement, or other material agreement or instrument to which Company or any of its Subsidiaries is a party or to which any of its assets or the assets of its Subsidiaries may be subject; or (c) to the best of our knowledge, violate any law, rule, license, regulation, judgment, order, ruling, or decree, including any insurance laws or regulations of any jurisdiction to which Company or any of its Subsidiaries are subject, governing or affecting the operation of Company or its Subsidiaries in any material respect. Neither the execution and delivery of the Transaction Documents by Company and its Subsidiaries, nor the consummation of the transactions contemplated thereby, will constitute an event permitting termination of any material agreement or the acceleration of any indebtedness of the Company or other liability, with or without notice or lapse of time, or result in the creation or imposition of any lien upon the Collateral.

4. No consent, authorization, approval or exemption by, or filing with, any Person or any Governmental Authority is required in connection with the execution, delivery and performance by Company and its Subsidiaries of the Transaction Documents, or the taking of any action contemplated thereby, except such as have been obtained prior to Closing.

5. All of the currently outstanding Pledged Shares are owned beneficially and of record by Company and, to the best of our knowledge, there are no warrants, options, or other rights to purchase such Pledged Shares.

6. Except for the lien of First Interstate Lien upon the First Interstate Shares, and any interest in the Commission collateral created or granted in favor of The Centennial Life Insurance Company pursuant to that certain Reimbursement Agreement dated August 11, 1995 among The Centennial Life Insurance Company, AIA Services Corporation, AIA Insurance, Inc., The Universe Life Insurance Company and AIA MidAmerica, Inc., the Collateral is free and clear of all pledges, liens, encumbrances, security interests, equities, claims, or options. Upon delivery of certificates representing the Pledged Shares of AIAI and Farmers to Shareholder at Closing, Shareholder shall have at Closing a perfected first priority security interest in such Pledged Shares.

7. To our knowledge, there are no claims, actions, suits, proceedings or investigations pending or threatened against or relating to Company or any of its Subsidiaries, at law or in equity before or by any Governmental Authority, nor has any such action, suit,

proceeding or investigation been pending during the three-year period preceding the date hereof. Neither Company nor any of its Subsidiaries is in default with respect to any adjudicatory order, writ, injunction or decree of any Governmental authority, and neither Company nor any of its Subsidiaries is a party to any cease and desist order, supervisory agreement or arrangement, consensual or otherwise, with any Governmental Authority.

The foregoing opinions are limited to the laws and regulations of the State of Idaho (excluding the principles of conflicts of laws); and we have not considered and expressed no opinion on the laws or regulations of any other jurisdiction. This opinion is rendered only with respect to the laws and the rules, regulations and orders (excluding the principles of conflicts of laws) of the State of Idaho that are in effect as of the date hereof. We assume no responsibility for updating this opinion to take into account any event, action, interpretation or change of law occurring subsequent to the date hereof that may affect the validity of any of the opinions expressed herein.

The enforceability opinion expressed in opinion ¶2 of this letter is subject to the following additional qualifications:

(i) The terms of any commission agreement, lockbox agreement or other account agreement which may affect the Commission Collateral, the rights of the parties (other than Company or any of its Subsidiaries) to any such agreement, and any claim or defense of such parties against the Company or any of its Subsidiaries rising under or outside any such agreement.

(ii) The qualification that certain rights, remedies and waivers contained in the Transaction Documents may be rendered ineffective, or be limited, by applicable Idaho laws or judicial decisions governing such rights, remedies and waivers; but the inclusion of such rights, remedies and waivers does not affect the validity or enforceability of other provisions of the Transaction Documents and, in the event the Company or any of its Subsidiaries does not comply with the material terms of the Transaction Documents, Mr. Taylor may exercise remedies that would normally be available under Idaho law to a secured party provided Idaho law applies and Mr. Taylor proceeds in accordance with such law.

(iii) We express no opinion with respect to the perfection or the relative priority of the security interests granted to Mr. Taylor in the Commission Collateral.

-4

This opinion is furnished by us solely for your benefit for use in connection with the Transaction Documents and the transactions contemplated thereby; and it may not be furnished or quoted to, or relied upon, by any other person.

Very truly yours,

Eberstadt Berlin Kading Turnbow & McKlveen, Chtd.

s/

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Attorneys for Plaintiff Reed J. Taylor

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

REED J. TAYLOR, an individual; Plaintiff, v. RICHARD A. RILEY, an individual; HAWLEY TROXELL ENNIS & HAWLEY LLP, an Idaho limited liability partnership; SHARON CUMMINGS, Personal Representative of the Estate of Robert M. Turnbow; and EBERLE, BERLIN, KADING, TURNBOW & McKLVEEN, CHARTERED, an Idaho corporation; Defendants.	Case No.: CV-OC-2009-18868 EXPERT WITNESS AFFIDAVIT OF RICHARD T. McDERMOTT

STATE OF NEW YORK)
) ss:
COUNTY OF ULSTER)

I, Richard T. McDermott, being first duly sworn on oath, deposes and says:

1. I am over the age of eighteen years, competent to testify in court, and make this Affidavit upon my personal knowledge, experience and education.

2. In 1962, I received a B.A. from Marquette University. In 1966, I obtained a J.D. from Fordham University School of Law.

3. In 1967, I was admitted to practice law in the State of New York. I am presently in good standing and licensed to practice law in the State of New York. I have been admitted to practice law in New York for over 45 years.

4. I am a member of the New York State Bar Association Securities Regulation Committee.

5. From 1966 through 1990, I was an Associate and Partner with the law firm of Alexander & Green/Walter Conston Alexander & Green (the firms combined). From 1990 through 2004, I was a Partner of Rogers & Wells/Clifford Chance LLP (the firms merged in 2000). While at that firm, I chaired the Legal Personnel Committee, and was responsible for the training, development, evaluation and advancement of associate attorneys and counsel, as well as being involved in the partner selection process.

6. From 2000 through the present time, I have been an Adjunct Professor at Fordham University School of Law. From 1980 through 1998, I was an Adjunct Professor at New York University School of Law. In both positions, I taught law school classes on the Legal

Aspects of Corporate Finance, and covered such subjects as debentures, indentures, preferred stock, convertible securities, dividends and stock repurchases as well as third party opinions in corporate transactions.

7. I am the co-author of Chapters 1 and 2 (Introduction and Elements of Opinion Letters, respectively) and author of Chapter 3 (Legal Opinions on Corporate Matters) of the Treatise: *LEGAL OPINION LETTERS A Comprehensive Guide to Opinion Practice* (Third Edition).

8. I have been a member of the TriBar Opinion Committee for twenty-two years. The TriBar Opinion Committee is a nationally recognized committee that publishes Reports on various aspects of opinion practice.

9. I am the author of *Legal Aspects of Corporate Finance* (4th ed. 2006) and 2010-2012 Supplements thereto, which is published by LexisNexis Matthew Bender; it is my understanding that the book has been used at twenty-two law schools. I am presently working on the Fifth Edition of that book, which is expected to be published early in 2013.

10. I have authored other articles and materials (including a Teacher's Manual for *Legal Aspects of Corporate Finance*).

11. In 1988, I was a visiting lecturer at Monash University in Melbourne, Australia and the University of Adelaide, Australia, Corporate and Business Law Centre. In 1999, I co-lectured with former Delaware Chancellor William Allen and James Fuld, author of *Legal Opinions In Business Transactions - An Attempt to Bring Some Order Out of Some Chaos*, 28 Bus. Law. 915 (1973), on the Law and Business of Investment Banking at the New York

University Center for Law and Business.

12. From 2009 through the present time, I have served as a Special Master for the New York State Supreme Court Appellate Division, First Department.

13. I have extensive experience in domestic and international corporate finance, mergers and acquisitions, tender offers, strategic alliances, bankruptcy reorganizations and other corporate matters. I have experience in the preparation of Proxy Statements and Reports to shareholders and the preparation of reports filed with the Securities and Exchange Commission.

14. I have prepared, delivered or approved over 100 opinion letters in my career. I also served on the Committee that approved opinion letters at my prior law firm.

15. I have never acted as an expert witness in a case against an attorney or a law firm.

16. I have consulted with Winston V. Beard, an attorney licensed to practice in Idaho with experience preparing and delivering opinion letters, regarding the standard of care in Idaho for attorneys preparing opinion letters.

17. I have reviewed the deposition transcripts of Richard A. Riley and Stanley Tharp, together with the exhibits thereto. I have reviewed certain Affidavits of Reed Taylor and Scott Bell. I have reviewed certain pleadings and papers filed in this action and the underlying action, including, without limitation, the recent affidavits of Richard Riley, D. John Ashby, Julianne Hall and Loren Ispsen, together with the exhibits thereto, and the Memorandums filed by the defendants in support of their pending motions for summary judgment. I have also reviewed the Stock Redemption Agreement, $6 Million Promissory Note, Security Agreement, Stock Pledge Agreement, shareholder and board meeting minutes, amended articles of incorporation

(including both versions filed in 1995), and other documents provided to me by Reed Taylor's counsel.

18. I have reviewed the applicable Rules and Commentaries in the Idaho Rules of Professional Conduct effective November 1, 1986 and July 1, 2004 (in both versions, Idaho acknowledges that a duty may or may not be owed by an attorney providing an evaluation to a third party. *See* RPC 2.3 and Comments thereto.) I have also reviewed a number of authorities and decisions, including, without limitation, I.C. § 30-1-6 (1995); I.C. § 30-1-2 (1995); I.C. § 30-1-46 (1995); the TriBar Reports; the Restatement of the Law Governing Lawyers; *Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer and Wood*, 80 N.Y.2d 377, 605 N.E. 2d 318 (1992); *Taylor v. AIA Services Corp.*, 151 Idaho 552, 261 P.3d 829 (2011); *Taylor v. McNichols*, 149 Idaho 826, 243 P.3d 642 (2010).

19. I have read Judge Brudie's decisions finding the redemption illegal and denying Mr. Taylor's motion for reconsideration in the underlying case. I have also reviewed Judge Greenwood's decision finding that Mr. Riley and Mr. Turnbow owed Reed Taylor a duty of care.

20. I have reviewed the Opinion Letter prepared and delivered to Reed Taylor by the defendants in this action, together with the attached exceptions and Certificates of Corporate Status. The Opinion Letter acknowledges, without exception, that Riley, Turnbow and Eberle Berlin were general counsel for AIA Services Corporation. The Opinion Letter is addressed to Reed Taylor and specifically invited his reliance by limiting him as the only party who may rely upon the Opinion Letter. The Opinion Letter contains several opinions customary in transactions such as the stock redemption, including, without limitation, that AIA Services Corporation had

the power and authority to enter into the Stock Redemption Agreement, that all necessary actions had been taken by shareholders and that the Stock Redemption Agreement constitutes the valid and binding obligation of AIA Services Corporation, enforceable in accordance with its terms.

21. My opinions set forth below are based upon Riley, Turnbow and Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered ("Eberle Berlin") not being attorneys for Reed Taylor in connection with the Stock Redemption Agreement and related matters, although I have reviewed documents and testimony that indicate there was, at a minimum, a past joint and concurrent attorney-client relationship between Rilely, Turnbow and other attorney(s) at Eberle Berlin and Reed Taylor and AIA Services Corporation.

22. Based upon my knowledge, education and/or experience, together with the authorities and information I have reviewed, assumed and disclosed above, I make the following opinions:

a. ~~Courts in the United States have routinely imposed liability against attorneys for preparing and delivering incorrect opinion letters to third parties. Generally, these claims are based on some form of negligence.~~

b. ~~As determined by Judge Brudie and affirmed by the Idaho Supreme Court, the Opinion Letter was materially incorrect since, among other things: (1) the Stock Redemption Agreement violated Idaho law (specifically I.C. § 30-1-6); (2) AIA Services Corporation did not have the corporate power or authority to enter into the Stock Redemption Agreement; (3) all necessary corporate action was not taken by AIA Services Corporation and its shareholders to authorize the execution delivery or performance by AIA Services Corporation of the Stock~~

~~Redemption Agreement; and (4) the Stock Redemption Agreement did not constitute the valid and binding obligation of AIA Services Corporation enforceable against it in accordance with its terms.~~

c. As general counsel for AIA Services Corporation, Riley, Turnbow and Eberle Berlin were in a position to see to it that all applicable legal requirements were complied with for the redemption of Reed Taylor's shares of Common Stock of AIA Services Corporation.

d. As general counsel for AIA Services Corporation, Riley, Turnbow and Eberle Berlin had two opportunities, prior to closing, to have the shareholders of AIA Services Corporation authorize an amendment to the articles of incorporation to authorize the redemption of Reed Taylor's shares by authorizing the use of capital surplus as permitted by I.C. § 30-1-6. As general counsel for AIA Services Corporation, Riley, Turnbow and Eberle Berlin had two opportunities, prior to closing, to have the shareholders vote on shareholder resolutions authorizing the redemption of Reed Taylor's shares and the use of capital surplus as permitted by I.C. § 30-1-6.

e. ~~The defendants' assert arguments pertaining to the restructuring of the redemption obligations to Reed Taylor in 1996 and the alleged subordination of the payment of the $6 Million Note to the redemption of Donna Taylor's Series A Preferred Shares in AIA Services Corporation. These arguments are irrelevant. The relevant inquiry is whether the opinions rendered in the Opinion Letter were accurate when the transaction to redeem Reed Taylor's shares was closed.~~ Since the transaction was not carried out in compliance with I.C. § 30-1-6 (1995), any subsequent restructuring or modification of the agreements and any

subordination issues are irrelevant because the original transaction was illegal. In addition, the defendants' assertions that the redemption of Reed Taylor's shares was legal because certain payments were subordinate to payments to Donna Taylor is not supported by any provision in I.C. § 30-1-6 or I.C. § 30-1-2.[1] ~~When the Opinion Letter was delivered at the time of closing, the redemption of Reed Taylor's shares was either legal or not. In addition, the 1996 restructure did not affect the $6 Million Promissory Note or the security interests relating thereto (which were rendered unenforceable by Judge Brudie's ruling and as affirmed by the Idaho Supreme Court). The Opinion Letter remains in full force and effect.~~

f. Mr. Riley and Mr. Turnbow, as the Opinion Letter preparers, and Eberle Berlin, as the signatory of the Opinion Letter, owed and/or assumed a duty of care to Reed Taylor to prepare and deliver the Opinion Letter in a non-negligent manner, which was to prepare and deliver the Opinion Letter exercising the degree of care and skill that a reasonably prudent opinion preparer would exercise under the same or similar circumstances. Mr. Riley, Mr. Turnbow and Eberle Berlin breached their duties owed to Reed Taylor when they failed to exercise that required degree of care and skill thereby delivering to him an incorrect Opinion Letter. There are no disclosures, assumptions, qualifications or exceptions in the Opinion Letter that insulate Mr. Riley, Mr. Turnbow or Eberle Berlin from any of the incorrect opinions or their

[1] Under AIA Services Corporation's Articles of Amendment to the Articles of Incorporation filed on April 11, 1995 and August 3, 1995, respectively, AIA Services Corporation was authorized to redeem Donna Taylor's shares using "legally available funds" and "only to the extent such redemption shall not violate the Idaho Business Corporation Act restrictions on the corporation's redemption of its own shares." *See* Article Fourth, Section 4.2.3. Donna Taylor's shares were only redeemed as payments were made to her, unlike Reed Taylor's redemption in which his shares were canceled and payments, instruments and security interests were granted to him at the time of the redemption. There are no provisions in AIA Services Corporation's Amendment of Amendment to the Articles of Incorporation authorizing the redemption of Reed Taylor's shares.

failure to prepare and deliver the Opinion Letter in a non-negligent manner. Indeed, if the Opinion Letter had disclosed that it was based on the so-called "fair value" test or some other analysis to which Mr. Riley has testified to justify the compliance with I.C. § 30-1-6 (1995), rather than the plain language of that statute, a reasonable opinion recipient would have insisted on a shareholder vote to permit the use of capital surplus and thus avoid any ambiguity or uncertainty with respect to the legality of the Stock Redemption Agreement.[2]

g. ~~Reed Taylor has testified that he would not have permitted his shares to be redeemed if the Opinion Letter had not been provided. Scott Bell testified that he would have advised Reed Taylor not to sell his shares if the Opinion Letter had not been provided. Both Reed Taylor and Scott Bell's testimony is consistent with Section 2.5(j) of the Stock Redemption Agreement, which required the Opinion Letter to be delivered to Reed Taylor as a condition of closing the redemption transaction. As a result, Reed Taylor was proximately damaged when Judge Brudie held that the Stock Redemption Agreement was illegal and unenforceable, which rendered the $6 Million Promissory Note, plus accrued interest, and the security interests granted to Reed Taylor as void and unenforceable obligations (which opinion was affirmed by the Idaho Supreme Court).~~

h. ~~I am not aware of any other instance in which an opinion giver's law firm has in effect disavowed his previously rendered third-party opinions. This was done here by Mr. Riley's law firm asserting in a judicial proceeding that the Stock Redemption Agreement is~~

[2] The obligations and duties owed by Riley, Turnbow and Eberle Berlin to Reed Taylor through the preparation and delivery of the Opinion Letter have nothing to do with any alleged negligent acts of Scott Bell or any other attorney at his firm.

~~unenforceable and illegal, notwithstanding the opinions stating the direct opposite. Moreover, the opinion givers ignored requests to assist the recipient of the opinion, Reed Taylor, in defending the Stock Redemption Agreement against the charge of illegality and enforcing it in accordance with its terms.~~

DATED: This 29th day of August, 2012.

Richard T. McDermott

SUBSCRIBED AND SWORN to before me this 29th day of August, 2012.

Notary Public for New York
Residing at: Ellenville, NY
My commission expires: _____

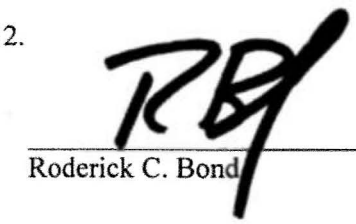
MARIE BALOGH
NOTARY PUBLIC, State of New York
No. 01BA5076592
Qualified in Ulster County
Commission Expires April 21, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date indicated below, I caused to be served true and correct copies of the foregoing document to the following parties:

	Via:
Jack S. Gjording Julianne S. Hall Gjording & Fouser, PLLC P.O. Box 2837 Boise, ID 83701 Fax: (208) 336-9177	(**X**) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile (**X**) Email (pdf attachment) (By Agreement)
	Via:
James D. LaRue Loren C. Ipsen Elam & Burke, PA P.O. Box 1539 Boise, ID 83704 Fax: (208) 384-5844	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile (**X**) Email (pdf attachment) (By Agreement)

Signed this 30th day of August, 2012.



Roderick C. Bond